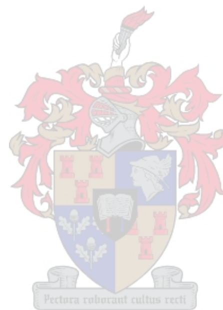
Self-Help Remedies in the Context of Construction Law in a Comparative Perspective

Nicole Newdigate



Thesis presented in fulfilment of the requirements for the degree of Master of Law in the Faculty of Law at Stellenbosch University

Supervisor: Professor GF Lubbe

April 2019

Stellenbosch University https://scholar.sun.ac.za

DECLARATION

By submitting this thesis electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the sole author thereof (save to the extent explicitly otherwise stated), that reproduction and publication thereof by Stellenbosch University will not infringe any third-party rights and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

NI Newdigate April 2019

Copyright © 2019 Stellenbosch University

All rights reserved

Stellenbosch University https://scholar.sun.ac.za

SUMMARY

This thesis examines the recognition of and resort to practical self-help remedies to ensure compliance with a construction contract by the parties - this is a consistent feature of construction law, seen regularly in building and engineering contracts across jurisdictions.

Accordingly, the thesis investigates the treatment of self-help remedies across three legal regimes. First under South African law, as a mixed legal system (comprising elements of both civil and English law), secondly under the law of the United Arab Emirates, which is a civil law jurisdiction but strongly influenced by the principles of Islamic Sharia law and, as a third point of evaluation, corresponding provisions of a standardised construction contract drawn from the FIDIC suite of contracts (a suite of contracts which is commonly used in the construction industry).

As a point of departure, the availability of the remedy of specific performance under South African law and the law of the United Arab Emirates is examined. A further investigation is undertaken to establish whether, the courts in such systems recognise specific performance and secondly whether a willingness exists to award specific performance in the context of construction contracts. The thesis then moves to propose that self-help remedies can serve as substitutes for court awarded specific performance, but it is important that these remedies are effectively regulated to achieve a proper balance between the interests of the parties and underlying considerations of principle and policy.

An enquiry is then conducted into the regulation and treatment of three popular self-help remedies in construction contracts namely: suspension as a self-help remedy available to both an employer and a contractor, liens as a self-help remedy available to a contractor and, liquidated damages as a self-help remedy available to an employer.

The thesis then concludes that, especially in jurisdictions where there is judicial reluctance to award specific performance, effectually regulated self-help remedies, are justifiable and effective motivators to encourage specific performance by a defaulting party.

Stellenbosch University https://scholar.sun.ac.za

OPSOMMING

Hierdie tesis ondersoek die erkenning en aanwending van praktiese eierigting remedies om die nakoming van konstruksiekontrakte te bewerkstellig. Hierdie werkswyse is 'n gevestigde verskynsel in die konstruksiereg en 'n kenmerk van bou- en ingenieurskontrakte in uiteenlopende jurisdiksies.

Die verskynsel van eierigting remedies word aan die hand van drie regsbedelings ondersoek, te wete die Suid-Afrikaanse reg as 'n voorbeeld van 'n gemengde regstelsel waarin elemente van sowel die romanistiese as die Engelse tradisie na vore kom, die reg van die Verenigde Arabiese Emirate (VAE) wat getuig van invloed van die Islamitiese Sharia reg op 'n romanistiese onderbou. By wyse van 'n verdere verwysingspunt word ag geslaan op relevante bepalings van 'n gestandardiseerde konstruksiekontrak, te wete die FIDIC kontraktestel, wat breë erkenning in die konstruksiebedryf geniet.

As 'n vertrekpunt word die beskikbaarheid van die daadwerklike vervulling as 'n kontraksremedie in die Suid-Afrikaanse en die reg van die VAE ondersoek. Afgesien van die vraag na die omstandighede waaronder die remedie in die algemeen beskikbaar is, is die spesifieke vraag na die bereidwilligheid van die howe om daadwerklike vervulling te gelas ten opsigte van 'n konstruksiekontrak. Die tesis doen aan die hand dat eierigting remedies nuttig aangewend kan word in die plek van daadwerklike vervulling, maar dat dit noodsaaklik is dat sodanige remedies behoorlik gereguleer word ten einde 'n balans tussen die belange van die partye asook onderliggende beginsels en beleidsoorwegings te bewerkstellig.

Teen hierdie agtergrond word die aandag gevestig op die aanwending van drie eierigting remedies in die konstruksiebedryf, te wete die moontlikheid om prestasie op te skort, wat beskikbaar is vir beide partye tot die ooreenkoms, die uitoefening van 'n retensiereg, wat beskikbaar is vir 'n kontrakteur en die insluiting van 'n strafbeding in die ooreenkoms as 'n remedie wat beskikbaar is vir die bou-eienaar.

Die tesis kom tot die slotsom dat, veral in jurisdiksies waarin daar sprake is van onsekerheid oor die toestaan van daadwerklike vervulling in die algemeen en in die besonder ook ten opsigte van konstruksiekontrakte, die toevlug tot goed

Stellenbosch University https://scholar.sun.ac.za

gereguleerde eierigting meganismes om nakoming te verseker regverdigbaar en doeltreffend is.

Stellenbosch University https://scholar.sun.ac.za

ACKNOWLEDGMENTS

Foremost to Professor Lubbe, from whom I have learned immeasurably more than I could ever have hoped, and to my parents and my husband, James Andrew - my greatest encouragers and my strength. This thesis is to them.

Stellenbosch University https://scholar.sun.ac.za

LIST OF ABBREVIATIONS

B.U. L. Rev.	Boston University Law Review
Harv. L. Rev.	Harvard Law Review
LQR	Law Quarterly Review
Notre Dame L. Rev	Notre Dame Law Review
PER/PELJ	Potchefstroomse Elektroniese Regsblad/Potchefstroom Electronic Law Journal
SA Merc LJ	South African Mercantile Law Journal
SALJ	South African Law Journal
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg

Stellenbosch University https://scholar.sun.ac.za

TABLE OF CONTENTS

DECLARATION........ i
SUMMARY ii
OPSOMMING iii
ACKNOWLEDGMENTS v
LIST OF ABBREVIATIONS vi

CHAPTER 1: INTRODUCTION........ 1
1 1 Self-Help Remedies in the Construction Context........ 1
1 2 A Comparative Perspective........ 4
1 3 The Scheme of Treatment – An Outline of the Study........ 8

CHAPTER 2: THE CONSTRUCTION CONTRACT UNDER UAE LAW AND SOUTH AFRICAN LAW: AN OVERVIEW........ 10
2 1 Introduction........ 10
2 2 South African Law........ 12
2 3 UAE Law........ 18
2 4 Comparison........ 22
2 5 Conclusion........ 24

CHAPTER 3: SPECIFIC PERFORMANCE........ 27
3 1 Introduction........ 27
3 2 Specific Performance as a Remedy in South African Law........ 28
3 2 1 A Hybrid Approach........ 28
3 2 2 The Crystallisation Problem........ 29
3 2 3 The Discretionary Approach Restored: *Benson*........ 31
3 2 4 The Position in respect of Construction Contracts........ 37
3 3 The Approach to Specific Performance as a Remedy in the UAE........ 44
3 3 1 How is Specific Performance defined under UAE Law (as a Civil Law System) 44
3 3 2 Circumstances when an Award of Specific Performance may be Departed from under UAE Law........ 45
3 3 2 1 Impossibility........ 45
3 3 2 2 Judicial Discretion – Instances where a Court may Order an Alternative to Specific Performance despite Specific Performance Remaining Possible........ 47
3 3 2 2 1 Oppressive Performance – Article 380(2) 47

Stellenbosch University https://scholar.sun.ac.za

3 3 2 2 2 Refusal by the Obligor to Perform.................................. 49
3 3 2 3 Alternatives to Specific Performance by the Obligor......................49
3 4 Comparison...50
3 5 Conclusion..56

CHAPTER 4: SUSPENSION AS A SELF-HELP REMEDY............................. 57
4 1 Introduction..57
4 2 Suspension under South African Law...58
4 2 1 The *Exceptio Non Adimpleti Contractus*.. 58
4 2 2 The Contractor's Right to Suspend...61
4 2 2 1 The Contractor's Right to Suspend based on the *Exceptio*............ 61
4 2 2 2 The Contractor's Right to Suspend based on the Construction Industry Development Regulations..66
4 2 3 The Employer's Right to Suspend Payment to the Contractor................69
4 2 3 1 The Employer's Right to Suspend Payment based on the *Exceptio*..69
4 2 3 1 1 Relaxation of the Reciprocity Principle and the Contractor's Right to Claim a Reduced Contract Sum...................................... 71
4 3 Suspension under UAE Law..75
4 4 The Red Book...82
4 4 1 Suspension by the Contractor... 82
4 4 2 Suspension by the Employer..85
4 5 Conclusion...88

CHAPTER 5: LIENS - A Self-Help Remedy for the Contractor..................... 92
5 1 Introduction...92
5 2 South African Law.. 93
5 2 1 Background..93
5 2 2 Legal Nature...94
5 2 3 Two Types... 94
5 2 4 The Scope of a Lien 95
5 2 5 Extent of the Protection of a Lien: Against Whom Does a Lien Operate.....95
5 2 6 Requirements... 97
5 2 6 1 Possession...97
5 2 6 2 Principal Obligation...100
5 2 6 3 Land should not belong to the State......................................104
5 2 6 4 Circumstances which affect the existence of a lien......................104
5 2 6 5 Lien should not be contracted out of.......................................105

Stellenbosch University https://scholar.sun.ac.za

5 2 7 Liens in the Construction Context....106
5 3 UAE Law....109
5 4 The Red Book....113
5 5 Comparison....115
5 6 Conclusion....117

CHAPTER 6: Liquidated Damages – A Self-Help Remedy for the Employer....118
6 1 Introduction....118
6 2 South African Law....122
6 3 UAE Law....127
6 4 The Red Book....133
6 5 Comparison....136
6 6 Conclusion....140

CHAPTER 7: CONCLUSION....142

INDEX OF SOURCES....147
BIBLIOGRAPHY....147
Index of Books.... 147
Chapters in Edited Collections 149
Index of Journals, Essays and Reports 151
Index of Theses 153
Index of Websites.... 153
INDEX OF LEGISLATION....157
South Africa....157
United Arab Emirates.... 158
Jurisdictions other than South Africa or the United Arab Emirates....158
INDEX OF CASE LAW....159
South Africa.... 159
United Arab Emirates.... 163
Jurisdictions other than South Africa or the United Arab Emirates....164

Stellenbosch University https://scholar.sun.ac.za

Chapter 1

Introduction

1 1 Self-Help Remedies in the Construction Context

Construction is a global phenomenon. Although projects differ in complexity and no one project is identical to the next, the challenges and problems faced on construction projects, across the world, remain the same.

Parties to a construction contract ultimately want the project to proceed to completion on the terms and conditions agreed to. Despite "court ordered" specific performance being a recognised legal sanction in many jurisdictions, it is not always the most feasible and effective way to compel compliance with a construction contract if completion is obstructed by a party's behaviour. For example, in South Africa, despite judicial development indicating the contrary,[1] it remains questionable how prepared South African courts are to order specific performance of a construction contract (especially against a contractor). Under UAE law, legislated grounds exist upon which a court may refuse an order for specific performance.[2] Accordingly, the courts under both systems are afforded considerable latitude regarding the availability of the remedy, which gives rise to uncertainty as to whether a contract will be enforced specifically. This, in addition to considerations of time and cost (naturally incurred when making an approach to the courts), results in parties having neither comfort nor guarantee that a request for specific performance will be acceded to by a court.

A consistent feature of construction law, seen frequently in building and engineering contracts across various jurisdictions, is the recognition of and resort to practical remedies to ensure compliance with a contract by the parties. This is because these remedies are arguably more efficient,[3] cost effective, certain and are designed to compel the other party to do what it has contractually undertaken to do in performing

[1] See Chapter 3 – "Specific Performance".
[2] See Chapter 3 – "Specific Performance".
[3] Especially regarding time as construction contracts are highly sensitive to time.

Stellenbosch University https://scholar.sun.ac.za

its agreed contractual obligations properly; in most instances, it is simply more onerous and costly for a party to pursue court awarded specific performance than to invoke these remedies to compel compliance.

In addition, the resort to such practical, self-help remedies to compel specific performance is often more simple and effective than a reliance on the cumbersome execution mechanisms supportive of court ordered specific performance.

Self-help remedies can be defined as:[4]

> "legally permissible conduct that individuals undertake absent the compulsion of law and without assistance of a government official in efforts to prevent or remedy a civil wrong."

A resort to self-help and private pressure entails an approach that is contrary to basic premises of the law of contract and the law in general. Contractual mechanisms authorising self-help, although agreed to, are accordingly often regarded as *contra bonos mores* and contrary to public policy, and without any legal effect.[5] Therefore, even in legal systems which recognise self-help remedies, their regulation with a view to achieving a proper balance between the interests of the parties and the reconciliation of underlying considerations of principle and policy is imperative.[6] Furthermore, to the extent that these mechanisms serve as substitutes

---

[4] See MP Gergen "A Theory of Self-Help Remedies in Contract" (2009) 89 *B.U.L Rev.* 1397 1397, who refers to Douglas I. Brandon et al, "Self-Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society" (1984) 37 *V and L. Rev.* 845, 850. See also Anonymous "Self-Help Remedies and Due Process" (2012) 48 *St John's Law Review* 661 673 - 674. It is important to note that all self-help remedies are not necessarily used solely in the context of and, for the purpose of, encouraging specific performance - certain self-help remedies (for example cancellation), may serve different purposes.

[5] GF Lubbe and CM Murray *Farlam and Hathaway: Contract Cases, Materials and Commentary* 3 ed (1998) 341. Underlying policy considerations such as the need to avoid a "breach of the peace" as a result of a party taking the law into his own hands in order to advance his contractual interests, in effect becoming a judge in his own case, require that a party, despite any agreement to the contrary, should in principle defer to the courts to compel the fulfilment of its interests.

[6] See Anonymous (2012) 48 *St John's Law Review* 673 - 674 where the author evaluates self-help remedies in a myriad of scenarios with a focus on enforcement and protection of the interests of the parties. For example, the author asserts that in commercial transactions, policy considerations favour the preservation of self-help remedies, but such an approach is not so readily acceptable in instances where significant property interests are at stake. It is noted that a blanket approach to self-help remedies cannot be applied. See also Gergen (2009) *B.U.L Rev*. 1399 – 1401 where the author makes two key observations in respect of self-help remedies; the first observation is that a party may withhold/refuse performance to avoid incurring a loss which may not be adequately covered by damages, even if the defaulting party suffers a disproportionate loss. The second is that in instances where withholding performance

Stellenbosch University https://scholar.sun.ac.za

for court awarded specific performance, it is essential that they are effectually regulated in order that they may effectively fulfil this function.

Suspension,[7] liens[8], and liquidated damages[9] are prime examples of self-help remedies to which an aggrieved party to a construction contract may resort to ensure compliance with the contract by a defaulting party. These three remedies are popular, used with a fair amount of regularity by parties and, are (on most occasions) effective in compelling contractual adherence by a defaulting party.

From a theoretical perspective, these remedies are to some extent anomalous and problematic. To some degree, all of them involve a resort to self-help in order to ensure the realisation of a party's private contractual rights. This "self-help" element is most obvious in the case of suspension and liens, which entail a party exerting pressure on a counterpart to extract performance without the intervention of a court. In the instance of liquidated damages, this same pressure exists (especially in jurisdictions where punitive measures are permissible), but is more indirect. On the conclusion of a contract, parties agree upon a sanction (usually in the form of a predetermined sum of money) which will apply automatically in the case of breach. In addition, a punitive liquidated damages provision is in itself problematic for

would cause significant loss, the parties are encouraged to each perform and resolve their differences in court; this must be compared with instances where withholding performance would not cause significant loss. In such instances, the law encourages parties to mutually attempt to resolve the dispute, through the withholding of performance, before approaching the courts. However, self-help remedies may also evade logical economic considerations resulting in economic waste – this also serves as an important consideration, but may be countered as self-help remedies do not deprive parties of their right to refer a dispute to the courts.

7 In a construction context, suspension operates by denying a contractor an entitlement to payment until it has completed the relevant works. In contrast, should an employer fail to make timeous payment, the contractor may suspend performance of the works, which will, in all likelihood, result in a delay to completion of the works; motivating the employer to make payment. See below, Chapter 4 – "Suspension as a Self-Help Remedy".

8 A contractor is able to exercise a lien, as a right of retention, over works or services performed for which it has not received due remuneration. The lawful exercise of a lien is imperative in all jurisdictions and should the exercise of this right be unlawful, an aggrieved contractor may be in breach of contract or face allegations of trespassing. See below, Chapter 5 – "Liens and Liquidated Damages".

9 The contractual mechanism entitling an employer to levy liquidated damages against a contractor is used regularly in the construction industry. An employer is entitled to impose a predetermined and agreed sum of money on a contractor should a contractor not complete the works by a fixed date or in instances where the works fail to comply with specified performance criteria. Liquidated damages clauses are therefore highly effective in compelling a contractor not only to deliver what it has undertaken to do but, in many instances, to also do so timeously.

Stellenbosch University https://scholar.sun.ac.za

entailing a resort to a private penal measure to extract timeous performance from a defaulting party.

It is therefore essential that when a party applies a self-help remedy to compel specific performance by a non-conforming party, the remedy is applied in the best possible manner and that an accidental repudiation of the contract by the innocent party is avoided. It is therefore proposed to investigate the effectiveness of these mechanisms, the permissible parameters of self-help, the requirements for the lawful application of these remedies and their proper regulation in achieving a vital balance between the interests of the parties to a contract.

1 2 A Comparative Perspective

Because systems embedded in diverse traditions might be thought to approach the problems attendant on these self-help remedies, which have a bearing on fundamental theoretical issues, in different ways, it is proposed to adopt a comparative approach to investigate how they are treated and regulated.

The thesis will accordingly investigate the treatment of suspension, liens and liquidated damages under South African law, as a mixed legal system (comprising elements of both civil and English law), with the law of the United Arab Emirates ("UAE law"), which is a civil law jurisdiction, but is strongly influenced by the principles of Islamic Sharia law. As a counterpoint, it is further proposed to evaluate the approach of these systems by reference to the corresponding provisions (or lack thereof) of the so-called Red Book[10] ("Red Book"), a standardised construction contract drawn from the FIDIC[11] suite of contracts which is regularly resorted to in the construction industry. These legal regimes shall be evaluated to investigate whether, if at all, the character of, requirements and, mechanisms of application of

---

10 The colour of the cover page of the contract.

11 The International Federation of Consulting Engineers (in French the ***F****édération* ***I****nternationale* ***d****es* ***I****ngénieurs*-***C****onseils* – hence the acronym FIDIC) produces the FIDIC suite of contracts. France, Belgium and Switzerland founded FIDIC in 1913 with other members only joining more than 30 years later (the United Kingdom joined in 1949, the United States in 1958 and many of the other countries only joined as late as the 1970s). Today, FIDIC has approximately 102 members. See C Wade "The FIDIC Contracts and Current Trends" (06-07-2006) *Society of Construction Law* https://www.scl.hk/file/paper/SCLHK044.pdf (accessed 04-10-2018) and FIDIC's website http://fidic.org/ (accessed 02 October 2018).

Stellenbosch University https://scholar.sun.ac.za

these remedies vary across such regimes and to identify the merits of each approach.

The United Arab Emirates ("UAE") is a federal country comprising of seven Emirates.[12] In addition, free zones have been established and exist in the various Emirates. The oldest and most prominent free zone was established in Dubai and is known as the Dubai International Financial Centre (the "DIFC"). The DIFC is governed by many of its own laws[13] and has an independent judicial system which is largely based on common law principles. The federal legal system is largely based on the civil law model. Islamic Sharia, is the primary (but not the exclusive) source of legislation and the UAE draws on principles derived from the Islamic Sharia, together with the laws of other Arab countries; in particular Egypt.[14]

The laws in the UAE are codified and are in Arabic. A primary source of legislation is Federal Law No. 5 of 1985 (Code of Civil Transactions) ("Civil Code"). In addition, decisions of higher courts may be referred to and may have persuasive value, but the law in the UAE does not recognise prior precedents as formally binding. The resultant discretion of the judge hearing a matter gives rise to considerable uncertainty.

The UAE (and especially Dubai), is a growing country, in a continuing state of development and continues to experience high volumes of construction work. However, the UAE, as a country, was only formally founded in 1971, with many of the core codes which underpin the legal structures only being introduced in the late 1980's.

In contrast, South African law, has had opportunity to develop over a much longer period of time. South African Private Law is based on Roman Dutch law with English influence. Apart from legislative interventions in particular areas, it is still largely uncodified, with the principles of Contract Law, for instance, in the main, being

12 Dubai, Abu Dhabi, Ajman, Fujairah, Ras Al Khaimah, Sharjah and Umm Al Quwain.

13 The dissertation will only address laws applicable to mainland UAE and not the laws applicable in the Free Zones.

14 M Grose *Construction Law in the United Arab Emirates and the Gulf* (2016) 5.

Stellenbosch University https://scholar.sun.ac.za

expressed in and developed by court decisions.[15] Unlike the UAE, there is a system of binding precedent and lower courts are bound by the decisions of higher courts.[16]

The development of the law by the courts is therefore not unfettered. The courts are furthermore empowered to and, have an obligation to develop the law in line with the Constitution and, in particular the Bill of Rights; "every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."[17] The Constitution is accordingly the key source of the values which now shape the development of South African law.

The relationship between parties to a construction contract is governed by the principles of the law of contract of South African law and the provisions of the UAE Civil Code respectively. To avoid potentially adverse consequences through the automatic application of the general law and, for the purposes of certainty, parties often contract out of these default provisions.[18]

A varied range of standardised contractual forms have developed with a view to encapsulating practices in the construction industry and, in respect of contracts of international scope, endeavouring to fuse the approaches of different systems into a unified form. These contractual prototypes are (more often than not) utilised by parties when concluding a construction contract.[19] Whilst parties are not obliged by

---

15 See generally, F Du Bois "Introduction: History, System and Sources" in CG Van der Merwe & JE Du Plessis (eds) *Introduction to the Law of South Africa* (2004) 1 40.

16 See JE Du Plessis "South Africa" in JM Smits (ed) *Elgar Encyclopaedia of South African Law* (2012) 814 816-817, Du Bois "Introduction: History, System and Sources" in: *Introduction to the Law of South Africa* 40 and R Zimmermann and D Visser "Introduction: South African Law as a Mixed Legal System" in R Zimmermann and D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 1 9.

17 Section 39 of the Constitution of the Republic of South Africa, 1996, read with sections 8 and 173; cf Du Bois "Introduction: History, System and Sources" in *Introduction to the Law of South Africa* 41.

18 Provided that these provisions are not mandatory.

19 See PM Nienaber "Construction Contracts" in WA Joubert & JA Faris *LAWSA* 9 3rd ed (2014) para 1: "A large body of legal understanding, sometimes referred to as 'construction law', has developed concerning the interpretation and application of construction contracts…This branch of the law of contract has generated standardised concepts due to the almost universal use of standard or 'stock' form contracts (see…*Concrete Construction Ltd v S Keidan & Co Ltd* 1955 4 SA 315 (A) 318) and the globalisation of the construction industry generally…" See also M Beletskaya *Development of the Contractual Remedies in International Trade: Comparative Analysis and Example if Implementation in Standard Construction Contracts* LLM thesis Helsinki University (2014) 98–104, where the author discusses various different types of standardised construction contract prototypes.

Stellenbosch University https://scholar.sun.ac.za

law to use standardised forms,[20] the decision to do so may bring distinct advantages.[21] The provisions of these standardised contracts can furthermore often be amended by the parties to reflect particular individual aspects of their relationship or to address specific legal requirements bespoke to certain jurisdictions.[22]

One of the most prevalent and commonly used forms of contract used for construction projects is published by FIDIC. FIDIC publishes a suite of contracts to suit the different requirements of different construction projects. Arguably, in industry, the most frequently used contract can be found in the 1999 suite; the FIDIC "Conditions of Contract for Construction", which is colloquially known as the FIDIC "Red Book".[23]

The FIDIC suite of contracts reflects the views prevalent in and solutions favoured by the broader construction industry. It seeks to promote best industry practice (including the fair allocation of risk on construction projects) internationally and is unhindered by the dictates and influences of a single national legal system.[24] In

---

20 M Latham *Constructing the Team* (1994) 5.21.

21 T Shnookal & D Charrett "Standard Form Contracting; The Role for FIDIC Contracts Domestically and Internationally" (19-06-2010) *Society of Construction Law* http://208.76.83.195/~mtecccom/wp-content/uploads/2010/06/Shnookal_Toby.pdf (accessed 04-10-2018) where the authors identify key advantages associated with standard form contracts namely: 1) Familiarity with the contractual provisions leads to efficiency and improvement in communication, which in turn results to better contract administration. 2) Due to familiarity with the contract there is no need to undertake comprehensive legal reviews nor draft contracts from scratch, therefore, there is a reduction in the time and cost of tendering. 3) Parties are provided with an impartial starting point for further negotiations. 4) Fewer misunderstandings arise between the parties and accordingly fewer disputes. 5) There may be a reduction in the tender price as contractors are not required to price unfamiliar additional risks.

22 FIDIC allows for amendment of the General Conditions of Contract by way of Particular Conditions, with the Particular Conditions taking precedence over the General Conditions in instances of conflict between the General Conditions and the Particular Conditions. See cl 1.5 [Priority of Documents] of the Red Book.

23 There are various revisions of FIDIC Conditions of Contract with the first edition of the Red Book being published in 1957 and the fourth (and final edition) being published in 1987. In 1999 a "new" Red Book was published and was marked as a "first edition" (the reason for marking the version published in 1999 as a "first edition" was because it could not be regarded as a direct update of the 1987 version) and, in late 2017, a second edition of the 1999 Red Book was published. Any references in this paper to the "Red Book" are to the First Edition published in 1999 as this remains, at present, the most commonly used contract in industry. It is also noted that the 2017 publication contains no changes which would materially affect conclusions reached in this dissertation.

24 Standing committees and ad hoc task groups are responsible for FIDIC's activities and, in particular, it is usually the Contracts Committee who takes responsibility (without remuneration) for producing the standard FIDIC forms. Lawyers and independent consulting engineers, from both common law and civil law jurisdictions, with experience in international construction, draft and update the contract suite with such drafts also being reviewed by people and organisations in a variety of jurisdictions. The FIDIC suite of contracts has therefore not been developed for

Stellenbosch University https://scholar.sun.ac.za

some instances, the FIDIC suite of contracts does not prescribe an applicable legal position. Arguably this may have been purposefully done by drafters due to the difficulty in harmonising the divergent approaches adopted by various legal systems[25] or, as a means to allow the governing national legal system (or understanding by the parties) to dictate the position. Alternatively, this may also just be a shortcoming and failure in the drafting.

The proposed investigation will explore whether, and if so how, the character of, the requirements for and mechanisms of application of the self-help remedies referred to vary across jurisdictions informed by such different legal traditions such as those of South Africa and the UAE and how these approaches compare, if at all, to that of the international construction industry as exemplified by the FIDIC Red Book.

It may therefore be beneficial to draw comparison across these different approaches, which ultimately all aim to achieve some form of regulation of the aforementioned identified self-help remedies.

This will be especially significant for the future development of the law of the UAE as the UAE continues to experience rapid growth and high volumes of construction. However, many aspects of the law are less mature than other jurisdictions, giving rise to uncertainty which could be addressed by academic commentary.

1 3 The Scheme of Treatment – An Outline of the Study

Chapter 2 begins by examining the relationship between the general principles of contract law and the law regarding specific contracts. The chapter then moves to consider construction contracts under the South African Common law (*locatio*

---

any particular legal system nor jurisdiction and the general conditions may need to be modified for use in certain jurisdictions. See C Wade "The FIDIC Contracts and Current Trends" *Society of Construction Law* and T Shnookal & D Charrett "Standard Form Contracting; The Role for FIDIC Contracts Domestically and Internationally" *Society of Construction Law.*

[25] See U Mattei "The Comparative Law and Economics of Penalty Clauses in Contracts" (1998) *Hastings International and Comparative Law Review* 884 901 where the author refers to similar difficulties found by promotors of the Project on the "Common Core of European Private Law" in instances where there is simply no "common core to codify or restate in certain areas of the law" with genuine divergence in a number of areas. Comparable problems were also experienced in respect of the United Nations Convention on Contracts for the International Sale of Goods. See B Nicholas "The Vienna Convention on International Sales Law" (1989) 105 *LQR* 201 201-207 and CF Hugo "The United Nations Convention on the International Sale of Goods: Its Scope of Application from a South African Perspective" (1999) 11 *SA Merc LJ* 1.

Stellenbosch University https://scholar.sun.ac.za

conductio operis) and UAE law (*muqawala*). Chapter 3 will consider specific performance under South African and UAE law, together with the availability and the willingness of courts in the respective jurisdictions to award specific performance in the event of non-performance of a construction contract. Chapters 4 and 5 will consider the treatment in these systems of self-help remedies of suspension, liens, and liquidated damages available to an innocent party in a construction contract to compel its defaulting counterpart to perform what it has undertaken to do, with reference (where applicable) to the provisions of the Red Book. The final chapter will summarise the conclusions drawn in each chapter and make suggestions for possible improvement and modification of the state of affairs under the respective systems.

Stellenbosch University https://scholar.sun.ac.za

Chapter 2

The Construction Contract under UAE Law and South African Law: An Overview

2 1 Introduction

A construction contract is a specific form of contract characterised by particular features which, if present in an agreement,[26] will result in it being classified as a construction contract. Construction contracts are subject to the general principles of contract law (including the requirements for validity).

Although there is no formal distinction under South African law between ordinary and commercial contracts, construction contracts can for the most part, be viewed as commercial contracts.[27] Under UAE law, despite the existence of commercial codes, these codes only serve as an important secondary source as none of the provisions are solely directed at construction contracts. The nature of the transaction is imperative in determining whether a contract is an "ordinary" contract or a "commercial" contract.[28]

[26] It is important to note such features can be termed *essentialia*. *Essentialia* do not express requirements for the validity of a contract but are essential for classifying a contract as belonging to a specific class of contract. See LF van Huyssteen, MFB Reinecke & GF Lubbe *Contract: General Principles* 5th ed (2016) 276.

[27] Nienaber "Construction Contracts" *LAWSA* 9 para 2. See also McEwan J in *Smith v Mouton* 1977 (3) SA 9 47. However, reference must also be made to the Housing Consumers Protection Measures Act 95 of 1998 which arguably implies a distinction between commercial and consumer construction contracts. The Housing Consumers Protection Measures Act was enacted to protect housing consumers (a person in the process of acquiring or who has acquired a home**)** from unscrupulous building contractors. The Act provides for the establishment of a Council called the National Home Builders Registration Council (NHBRC) a statutory body which functions to regulate the home building industry and to protect housing consumers. It also extensively prescribes protective measures for the housing consumer, including warranties which, by virtue of the Act, are "statutory *naturalia"* and cannot be excluded. GF Lubbe "Law of Purchase and Sale" 1998 *Annual Survey of South African Law* 208 210 – 212 and CG Van der Merwe & JM Pienaar "Law of Property (Including Real Security)" 1998 *Annual Survey of South African Law* 284 287.

[28] When establishing if the contract is "commercial" or "ordinary", the nature of the transaction plays a key role. A construction contract is asserted to be a civil transaction, as an employer is more often than not viewed as a consumer and not a business (but this is largely dependent on the facts of each transaction) - see Grose *Construction Law in the United Arab Emirates and the Gulf* 15. See also Dubai Court of Cassation 349/2002. Note that in the event of conflict, the provisions of the commercial code will take preference over the provisions of the Civil Code.

Stellenbosch University https://scholar.sun.ac.za

In the UAE, a construction contract is titled a "*muqawala"* and there are special statutory requirements applicable to such contracts. These requirements, can be found in the Civil Code and these provisions, specifically applicable to construction contracts, mark such contracts as a nominate or special contracts.[29] Therefore a *muqawala* will be subject to the provisions in the Civil Code which govern contracts generally as well as the provisions governing *muqawala.*[30] The same is true under the law of South Africa, where a construction contract is categorised as a *locatio conductio operis*, but is still subject to the general principles of contract.[31]

The respective legal systems also presume that certain special legal consequences[32] applicable to a *muqawala* or *locatio conductio operis* will apply unless the parties have agreed otherwise.[33] Therefore, when negotiating a construction contract, the parties need to be aware that eventualities not provided for in their agreement will be regulated by terms and consequences implied into their relationship by law.

As construction contracts, as specific contracts, are also governed by the general principles of contract law, it will be helpful to (very briefly) identify the requirements for the conclusion of a valid contract under both the law of South Africa and the Civil Code, before moving to discuss the construction contract under the respective systems.

---

29 Grose *Construction Law in the United Arab Emirates and the Gulf* 14.

30 Article 128(1) of the Civil Code says: "The general provisions contained in this Part shall apply to nominate and innominate contracts." See also Grose *Construction Law in the United Arab Emirates and the Gulf* 14.

31 See, e.g., McEwan J in *Smith v Mouton* 1977 (3) SA 9 47 where it was held: "It should be stated first that there is no special law different from the law relating generally to contracts and their interpretation that applies to building contracts and to architects' certificates issued under them."

32 Such terms and consequences are describable as *naturalia* and "which are as a rule, attached by the law (hence *ex lege* terms) to every contract of a particular class. *Naturalia* help to determine the rights and duties of contracting parties and the effects and consequences of their contracts." Van Huyssteen et al *Contract: General Principles* 276.

33 These additional terms are called *incidentalia* or *accidentalia*. "[C]ontractants often have special requirements for which the *essentialia* and *naturalia* of the contract do not provide, or for which the *naturalia* do provide, but in a manner different from that which the contractants would prefer. In such circumstances contractants may, in principle, insert additional (supplementary) terms to achieve their common goal. Such additional terms are called *incidentalia* or *accidentalia*." See Van Huyssteen et al *Contract: General Principles* 277. See also E Finsen *Building Contract: A Commentary on the JBCC Agreements* 2 ed (2006) 2.

Stellenbosch University https://scholar.sun.ac.za

As a starting point, a commonly accepted definition of "contract" is the following:

> "An agreement enforceable at law. An essential feature of contract is a promise by one party to another to do, or forbear from doing, certain specified acts. The offer of a promise becomes a promise by acceptance. Contract is that species of agreement whereby a legal obligation is constituted and defined between the parties to it."[34]

2 2 South African Law

Under South African law the requirements for the conclusion of contract are:[35]

1. Consensus – agreement or a meeting of the minds between the contractants must be reached;[36]
2. Capacity – the parties to the contract must be competent to contract;[37]
3. Formalities – there may be formalities imposed by statute[38] or by the parties themselves;[39]
4. Legality – the agreement may not be unlawful, i.e. *contra bona mores* or against public policy;[40]
5. Possibility – the obligations created must be objectively possible - capable of being performed when the contract is concluded;[41]
6. Certainty – the content of the agreement must be definite or ascertainable.[42]

---

34 M Woodley *Osborn's Concise Law Dictionary* 12 ed (2013).

35 D Hutchison "The Nature and Basis of Contract" in D Hutchison & CJ Pretorius (eds) *The Law of Contract in South Africa* (2017) 3 6; P Ramsden *Mckenzie's Law of Building and Engineering Contract and Arbitration* 7 ed (2014) 7. See also Finsen *Building Contract* 1.

36 Van Huyssteen et al *Contract: General Principles* 52.

37 B Kuschke "Contractual Capacity" in D Hutchison & CJ Pretorius (eds) *The Law of Contract in South Africa* 153 154.

38 For example, the Alienation of Land Act, 68 of 1981 prescribes writing as a formality for alienations of land. See T Floyd "Formalities" in D Hutchison, & CJ Pretorius (eds) *The Law of Contract in South Africa* 163 165.

39 For example, see Ramsden *Law of Building and Engineering Contract and Arbitration* 11 and Van Huyssteen et al *Contract: General Principles* 146 – A pre-existing contract between the parties may prescribe compliance with certain formalities for the existence of a valid contract. However, in some instances, parties who reduce a document to writing may do so for evidential purposes rather than to impose formalities.

40 Floyd "Legality" in *The Law of Contract in South Africa* 173 181.

41 Van Huyssteen et al *Contract: General Principles* 181. See also JE du Plessis "Possibility and Certainty" in D Hutchison, & CJ Pretorius (eds) *The Law of Contract in South Africa* 213 213.

42 Du Plessis "Possibility and Certainty" in *The Law of Contract in South Africa* 218.

Stellenbosch University https://scholar.sun.ac.za

Therefore, consensus is indispensable; parties need to reach agreement with regard to the "essential elements" of the contract. Possibility, certainty and legality, together with contractual competence are also vital to valid contract conclusion and, in addition, certain formalities may also need to be adhered to.

South African law, classifies a construction contract as a contract for the letting and hiring of work, i.e. a *locatio conductio operis*.[43] Such contracts belong to the class *locatio conductio operis faciendi*.[44] A *locatio conductio operis* as an entire[45] contract is subject to the general principles of contract and may be concluded in the same way that any other ordinary contract is concluded. When forming a *locatio conductio operis*, the parties may negotiate directly or through a tender procedure.[46] Although there are in general no additional prescribed contract formalities, such as a reduction to writing that have to be complied with;[47] a *locatio conductio operis* is invariably recorded in a standardised written document. Usually the agreement will consist of "a series of cross-linked and complementary documents, mostly with their own mechanisms for establishing an order of precedence and for resolving ambiguities and internal discrepancies."[48]

---

[43] Finsen *Building Contract* 16. See also *Sifris en 'n Ander NNO v Vermeulen Broers* 1974 (2) SA 218 (T).

[44] Nienaber "Construction Contracts" *LAWSA* 9 para 1.

[45] Alternatively, a "synallagmatic, reciprocal or bilateral" contract: Finsen *Building Contract* 16.

[46] Ramsden *Mckenzie's Law of Building and Engineering Contract and Arbitration* 3. In some instances (and almost certainly in projects involving organs of state) it is legislated that a prescribed tender process is performed before a contract is awarded. See in this regard the Preferential Procurement Policy Framework Act 5 of 2000, Public Finance Management Act 1 of 1999 and, the Promotion of Administrative Justice Act 3 of 2000, section 217 of Constitution of the Republic of South Africa, 1996 and Van Huyssteen et al *Contract: General Principles* 89. See also *Joubert Galpin Searle v Road Accident Fund* 2014 (4) SA 148 (ECP) 68 where the following was confirmed: "(a) the decision to award a tender is an administrative action and the PAJA therefore applies; (b) generally speaking, once a contract has been entered into following the award of a tender, the law of contract applies; (c) but a contract entered into contrary to prescribed tender processes is invalid; and (d) consequently, 'even if no contract is entered into, all steps taken in accordance with a process which does not comply with the prescribed tender process are also invalid.'"

[47] Nienaber "Construction Contracts" *LAWSA* 9 para 4. The Housing Consumers Protection Measures Act, provides at section 13 that the home builder is to ensure that agreements for the construction or sale of a home are to be in writing and signed; failure to do so, will not result in the agreement being invalid but may result in the home builder being unable to rely on certain protective measures (such as the right of the home builder to demand a deposit – section 13(7)). See Lubbe 1998 *Annual Survey of South African Law* 211.

[48] Nienaber "Construction Contracts" *LAWSA* 9 para 8. See also Finsen *Building Contract* 7.

Stellenbosch University https://scholar.sun.ac.za

The contract of *locatio conductio operis* was described in the following way in *Smit v Workmen's Compensation Commissioner*:[49]

> "*Locatio conductio operis (faciendi),* i.e. the letting and hiring of a particular piece of work or job to be done as a whole (*opus faciendum*). This was a consensual contract whereby the workman as employee or hirer (*conductor* or *redemptor operis*) undertook to perform or execute a particular piece of work or job as a whole (*opus faciendum*) for the employer as letter or lessor (*locator operis*) in consideration of a fixed money payment (*merces*)."

The "immediate" parties to a construction contract therefore, are the employer (*locator*) and the contractor (*conductor*).[50] Zimmermann describes this relationship in the following way:

> "One person undertakes to perform or execute a particular piece of work, and he promises to produce a certain specified result. This person is called the *conductor* (*operis*). The person commissioning the enterprise (the customer) is the *locator*: he places the work to be done."[51]

Therefore, under a *locatio conductio operis*, the primary obligation of the contractor is to complete and handover the agreed works.[52] In exchange for this undertaking, the primary obligation of the employer is to pay the contractor the agreed remuneration for such works.[53]

The classification of an agreement as a *locatio conductio operis* is consequent upon the *essentialia*[54] of the contract being present in a particular case and this enables

---

49 1979 (1) SA 51 (A) 154.

50 Nienaber "Construction Contracts" *LAWSA* 9 para 3. See also Zimmermann *The Law of Obligations Roman Foundations of the Civilian Tradition* 393 – 394. Nienaber "Construction Contracts" *LAWSA* 9 para 3 goes onto describe parties such as the engineer, architect and quantity surveyor as intermediate parties, as they are not party to the construction contract itself but "fulfil vital inter-party functions even in the day-to-day operations of the project." Note that the contract between a contractor and a subcontractor may also be classified as a *locatio conductio operis* with the contractor, in the subcontract relationship technically becoming the "employer" and the subcontractor becoming the "contractor" but for ease, parties are not referred to as such. See Finsen *Building Contract* 29.

51 Zimmermann *The Law of Obligations Roman Foundations of the Civilian Tradition* 393.

52 Nienaber "Construction Contracts" *LAWSA* 9 para 9. See also Finsen *Building Contract* 1.

53 Should there be no agreement regarding remuneration, the contractor is entitled to be paid a reasonable amount and the onus lies with the plaintiff to prove that there was no agreement – see H Daniels *Beck's Theory and Principles of Pleadings in Civil Actions* 6 ed (2002) 13.57. See also Nienaber "Construction Contracts" *LAWSA* 9 para 9.

54 Lubbe & Murray *Farlam and Hathaway: Contract: Cases, Materials and Commentary* 283.

Stellenbosch University https://scholar.sun.ac.za

a distinction between this contract type[55] and other specific contracts.[56]

A *locatio conductio operis* is an "entire" or synallagmatic contract.[57] Because the performances are undertaken in exchange for one another, they are reciprocally linked to one another. Unlike, for example, a contract of sale which calls for simultaneous performance by the parties, the *locatio conductio operis* is a typical example where one party, i.e. the contractor, is required to perform his complete obligation before the other party, the employer, is required to perform his side of the bargain.[58] The contractor is accordingly not entitled to payment until it has completed the works[59] (unless of course, there is an agreement to the contrary). It is important to note, however, that industry norms dictate that, due to the great expense of constructing and for cash flow purposes, it is not viable for a contractor only to receive payment upon the discharge of all its obligations. It is accordingly common practice to contract out of[60] such strenuous payment provisions by providing for interim payments[61] and, in many instances, even for an advanced payment by the employer to the contractor.[62]

Agreement on the essential elements is sufficient to constitute a construction contract and will result in the relationship of the parties being supplemented by

---

55 The conventional form of a construction contract is whereby the contractor supplies all necessary material and labour to execute the works in accordance with the design and specifications provided by the employer. However, in many instances the calculation of the contract price payable in exchange for the execution of the works may vary - popular examples include (amongst others) payment by way of lump sum, lump sum with a bill of quantities, lump sum based on a provisional bill of quantities or a cost-plus contract. In some instances, the construction contract may be a labour only contract whereby the contractor only supplies labour, using the materials supplied by the employer. However, in other instances, the contractor is responsible not only for the construction of the works but for producing the design of the works as well - see Finsen *Building Contract* 19 – 28.

56 See e.g. *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) 61 where the distinction between the key legal characteristics of the *locatio conductio operarum* and the *locatio conductio operis* were drawn. See also Zimmermann *The Law of Obligations Roman Foundations of the Civilian Tradition* 394 – 397.

57 Finsen *Building Contract* 16. See also *B K Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A); Zimmermann *The Law of Obligations Roman Foundations of the Civilian Tradition* 393.

58 Finsen *Building Contract* 17.

59 17.

60 For example, the Red Book at Cl 14 makes provision for interim payments.

61 Finsen *Building Contract* 2.

62 Interim Payments are actually advance payments on the sum that will fall due on completion – see *Thomas Construction (Pty) Ltd (in liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1988 (2) SA 546 (A) and Chapter 4 "Suspension as a Self-Help Remedy".

Stellenbosch University https://scholar.sun.ac.za

rights, duties and further legal consequences, which attach to the agreement as so-called *naturalia* by virtue of its classification as a *locatio conductio operis*.[63]

However, in practice the *naturalia* of a contract of *locatio conductio operis* are extensively adjusted by the parties (*incidentalia* or *accidentalia*) as many of these *naturalia* do not adequately address the issues that arise in respect of modern day construction projects.[64] This is particularly evident in instances where parties rely and conclude construction contracts wholly based on standardised documentation such as the Red Book. Examples in the discussions below illustrate the interplay between *naturalia* and incidental terms which results in a deviation from the default rights, duties and consequences typical of the contract.

As the contractor is not an employee of the employer but an independent contractor,[65] it may perform its core obligation, namely the execution of the works in any manner[66] it deems fit, provided the works are complete by the agreed time.[67] Should there be no agreed date for completion, the contractor will be obliged to complete the works within a "reasonable" time with due regard to the nature of the works and the surrounding circumstances.[68]

The contractor is not obliged to complete the works himself[69] and may ordinarily

---

[63] Nienaber "Construction Contracts" *LAWSA* 9 para 9; Lubbe & Murray *Farlam and Hathaway: Contract: Cases, Materials and Commentary* 283.

[64] Finsen *Building Contract* 18. Also see Finsen at 2 "Building contracts usually contain a large number of terms to avoid the rules of the common law that the parties consider impractical or inconvenient for their purpose, to suit their convenience and to ensure that the contract is business like and efficient."

[65] See Finsen *Building Contract* 17, SA Van der Merwe *A Comparative Evaluation of the Judicial Discretion to Refuse Specific Performance* LLD thesis Stellenbosch University (2014) 194 - 195, Ramsden *McKenzie's Law of Building and Engineering Contract and Arbitration* 49 and Nienaber "Construction Contracts" *LAWSA* 9 para 1.

[66] Subject of course to any contractual provisions to the contrary. Finsen *Building Contract* 17. See also Zimmermann *The Law of Obligations Roman Foundations of the Civilian Tradition* 394 – "The decisive feature of all these transactions is that the customer was not interested in the services or labour as such, but in the product or result of such labour…The conductor was responsible for producing the result; how he did this was (usually) up to him."

[67] Nienaber "Construction Contracts" *LAWSA* 9 para 35.

[68] Ramsden *McKenzie's Law of Building and Engineering Contract and Arbitration* 177 and Nienaber "Construction Contracts" *LAWSA* 9 para 35.

[69] Unless there is an agreement to the contrary (it is common for a contract contain a clause requiring consent from the employer before a subcontractor is appointed) or if the works are of such a highly personal nature, that the intended result can only be achieved if the contractor performs personally (for example in instances of design). See Zimmermann *The Law of Obligations Roman Foundations of the Civilian Tradition* 397 ("Artists for instance, may often

Stellenbosch University https://scholar.sun.ac.za

subcontract the works to a third.[70] However, the contractor remains responsible to the employer and no contractual nexus is created between the employer and the subcontractor.[71]

It is implied by law that the contractor must execute the works in a "proper and workmanlike manner" and materials used by the contractor must be "of sound quality and fit for their designated purpose".[72] Should the contractor fail to meet these objectives, it will be obliged to make good at its own cost.[73]

The contractor bears the risk for damage to or loss of the works until completion is reached and the works are delivered to the employer.[74] And, regarding liability for defects, the contractor is held liable for loss or damage to the works due to defective workmanship.[75] This liability extends over the lifetime of the works.[76] However, parties are not prohibited by law[77] to contractually limit the defects liability period and often do so.[78]

have to perform in person, even where that is not expressly stipulated (as was in the case of Albrecht Durer, who undertook to paint the middle section of the Heller altarpiece himself, 'and no other human being than myself shall paint one stroke of it': *Rudolf Huebener, A History of Germanic Private Law* (1918). p.555)." Nienaber "Construction Contracts" *LAWSA* 9 para 82.

70 *Smit v Workmen's Compensation* 1979 (1) SA 51 (A), Finsen *Building Contract* 17 and Nienaber "Construction Contracts" *LAWSA* 9 para 82.

71 Due to the large scale and complexity of many construction contracts, it is almost inevitable that subcontractors will be appointed and in many instances the employer may reserve the right to elect (or to be part of the selection process) subcontractors. See Ramsden *McKenzie's Law of Building and Engineering Contract and Arbitration* 167. See also Zimmermann *The Law of Obligations Roman Foundations of the Civilian Tradition* 397 and Nienaber "Construction Contracts" *LAWSA* 9 para 83 – 84.

72 Nienaber "Construction Contracts" *LAWSA* 9 para 42.

73 Finsen *Building Contract* 17.

74 Nienaber "Construction Contracts" *LAWSA* 9 para 51. See also Finsen *Building Contract* 17. In some instances, the parties may agree that certain portions of the work may be "taken over" by the employer prior to completion of the works as a whole. It is common that in such instances, the risk for that particular portion of work will pass to the employer whilst the risk for the remainder of the works remains with the contractor.

75 See Zimmermann *The Law of Obligations Roman Foundations of the Civilian Tradition* 397 "he was taken to have guaranteed, by implication, that he possessed the skills necessary for the job he had undertaken. After all, he had made himself contractually responsible for the finished product and thus endangered a reasonable expectation in the person his customer that he was competent to perform or execute such opus faciendum." See also Nienaber "Construction Contracts" *LAWSA* 9 para 78.

76 Finsen *Building Contract* 17 and Nienaber "Construction Contracts" *LAWSA* 9 para 60.

77 This is unlike the Civil Code where parties under Article 882 are prohibited from contracting out of decennial liability.

78 This is known as the "Defects Notification Period" under the Red Book.

Stellenbosch University https://scholar.sun.ac.za

There are no specific provisions applicable to the termination of a *locatio conductio operis* and construction contracts may accordingly be terminated in the same manner as any other contract.[79]

2 3 UAE Law

Articles 125 – 129 and Articles 199 – 206 of the Civil Code relate specifically to conclusion of valid contracts in the UAE. Article 209 of the Civil Code describes a valid contract to be:

> "…a contract which is lawful in its essence and description, being made by a competent person in respect of a subject matter properly falling within the ambit of a contract, having an existing, valid and lawful purpose and in proper form, and unaccompanied by any vitiating condition."

Article 130[80] of the Civil Code identifies that offer and acceptance[81] are essential to contract conclusion[82] and Article 129 sets out the "necessary elements" for the conclusion of a valid[83] contract;[84]

> "The necessary elements for the making of a contract are:
> a) that the two parties to the contract should agree upon the essential elements;
> b) the subject matter[85] of the contract must be something which is possible and defined or capable of being defined and permissible to be dealt in; and
> c) there must be lawful purpose[86] for the obligations arising out of the contract."

---

79 Nienaber "Construction Contracts" *LAWSA* 9 para 116.

80 Article 130 says*:* "A contract shall be made by virtue solely of the confluence of offer and acceptance, subject to the specific provisions laid down for the making of the contract by law.*"* See also Article 125 of the Civil Code.

81 O Eltom *The Emirates Law in Practice: Case Law Study, 100 Legal Issues; with a Special Focus on the Emirate of Dubai* (2009) 24, the author makes the point that offer and acceptance do not need to be contained in the same or a single document.

82 See also Article 125 of the Civil Code. It is important to note that intention may be express or implied – See Eltom *The Emirates Law in Practice* 23.

83 Conversely Article 201 describes a "void" contract as *"*one which is unlawful in essence and form, lacking the elements of a contract or defective in its subject matter or purpose or form as laid down by the law for the making of a contract…*"*.

84 A MacCuish & N Newdigate "Back to Basics – The Construction and Engineering Contract" (14-05-17) *Mondaq* http://www.mondaq.com/x/591360/Building+Construction/Back+To+Basics+The+Construction+Engineering+Contract (accessed 03-07-17).

85 See also Articles 199, 200, 202,203 and 204 of the Civil Code regarding "subject matter".

86 See also Article 207 which provides (in part) that the purpose of the contract must be "existent, valid and permitted, and not contrary to public order or morals" and Article 208(1) which provides that a contract shall be void "if it does not contain a lawful benefit to both contracting parties".

Stellenbosch University https://scholar.sun.ac.za

Consensus, i.e. agreement on the essential elements,[87] possibility of performance, identity and certainty regarding the subject matter together with a lawful purpose are therefore key for the valid conclusion of a contract. Dubai Court of Cassation Judgment 255/2007[88] neatly summarised these requirements and held as follows:

> "In order for there to be a contract the law requires that there must be a coming together of offer and acceptance, and that they be linked and that they coincide in such a way that the effect is established over the thing contracted for, and that it gives rise to an obligation on each of the parties with regard to the other. There must be mutual consent by both parties over the basic elements of the obligation and over the other lawful conditions that are regarded as basic. The subject matter of the contract must be something that is possible and specified, or capable of being ascertained and permissible to deal in."

Under UAE law, a construction contract is titled "*muqawala*". Chapter 3 of the Civil Code governs "Contracts of Work" and Part 1 of this chapter is titled "*Muqawala* (contract to make a thing or to perform a task)".[89]

Article 872 to Article 896 of the Civil Code set out the provisions which are specifically applicable to *Muqawala*. Section 1 of Part 1 contains Articles 872 – 874 with Article 872 of the Civil Code defining a "*muqawala"* as the following:

> "a contract whereby one of the parties thereto undertakes to make a thing or to perform work in consideration which the other party undertakes to provide."

It is important to note that these provisions are not restricted solely to the relationship between contractors and employers but extend to designers (such as engineers and architects) and subcontractors.[90]

Article 873 goes on to detail the definition provided in Article 872 and provides that a *muqawala* can take on various forms, by giving a few examples:[91]

---

[87] See also Article 141 of the Civil Code.

[88] 27 January 2008.

[89] *Muqawala* must be distinguished from Contracts of Employment. Contracts of Employment are governed by other articles under the Civil Code namely, Articles 897 – 923.

[90] MacCuish & Newdigate "Back to Basics – The Construction and Engineering Contract" *Mondaq*.

[91] For example, a *muqawala* can be a straight build contract or even a pure labour contract, whereby all materials are free issue materials and the contractor needs only to supply labour or, merely to co-ordinate. Alternatively, the contract may be a design and build or turnkey contract whereby the contractor undertakes all risk and responsibility to execute and complete the works (including design responsibility) - MacCuish & Newdigate "Back to Basics – The Construction and Engineering Contract" *Mondaq*.

Stellenbosch University https://scholar.sun.ac.za

> "(1) The agreement in a *muqawala* contract may be restricted to the contractor undertaking to provide the work on condition that the employer provides the material to be used, or that the contractor makes use of them in carrying out his work.
>
> (2) It shall also be permissible for the contractor to provide the materials and the work."

In addition, Article 874 of the Civil Code importantly provides the following:

> "In a *muqawala* contract, there must be a description of the subject matter of the contract, and particulars must be given of the type and amount thereof, the manner of performance and the period over which it is to be performed, and the consideration must be specified."

Therefore, it is significant that the following are observed;

- the subject matter and type of contract must be adequately described. It is very important that the scope of works are sufficiently detailed. What needs to be contained in the scope of works will largely be determined by the type and complexity of the project.[92]
- the manner of performance must be specified;[93]
- a time for completion must be specified;[94] and
- the consideration for the work to be performed must be specified.[95]

In some instances, under UAE law, it is a requirement that the particular contract is reduced to and concluded in writing - this is not the case for a *muqawala*.[96] Nonetheless, it is the industry norm to capture construction contracts in some form of writing. Some construction contracts may be overly detailed and others may contain very little to no detail – merely setting out the bare minimum. A written memorial providing a detailed record of the agreement is important to provide the

---

92 MacCuish & Newdigate "Back to Basics – The Construction and Engineering Contract" *Mondaq.*

93 See for example Article 877 of the Civil Code. Parties can of course also agree a certain standard and quality of performance (materials and workmanship) and the contractor will be held to this standard.

94 The Civil Code does not specify how the time for completion must be specified and it is unclear whether a time frame as opposed to a specified time for completion will suffice. For example, instead of inserting a specific completion date into the conditions of contract, would it be in order if a contract specified that the project must reach completion within x days/months.

95 It appears failure to include such detail will not be fatal to the classification or validity of the *muqawala* as Article 888 provides "the contractor will be entitled to fair remuneration, together with the value of the materials he has provided as required by the work."

96 Grose *Construction Law in the United Arab Emirates and the Gulf* 32.

Stellenbosch University https://scholar.sun.ac.za

parties with contractual certainty and guidance when executing the works and overcoming inevitable hurdles, which will be faced during the contract term.[97]

Section 2 of Part 1 is titled "Effects of *Muqawala*" and prescribes the obligations of both the employer and the contractor, describing (amongst other things) the manner in which the work is to be performed, the remedies available to the employer in instances where defective work[98] is tendered by the contractor, delivery of the works once completed, the manner and timing of payment[99] and remedies available to the contractor in instances of non-payment.

Articles 880 – 883 in Section 2 are applicable to architects and engineers (as well as contractors), holding such parties liable to the employer for a period of 10 years (or even longer should the parties so agree), in instances where the works totally or partially collapse or where a defect which threatens the stability or safety of the works manifests itself.[100]

Section 3 of Part 1 starts at Article 890 and is headed "Subcontracting". This section allows for the contractor to subcontract a part or the whole of the works (provided that there is no express prohibition in the contract) to a third party (subcontractor).

---

97 MacCuish & Newdigate "Back to Basics – The Construction and Engineering Contract" *Mondaq*.

98 The Civil Code distinguishes between instances where the defective works are remediable and instances where it is impossible to rectify the defective works.

99 Article 885 of the Civil Code says that the employer's obligation to pay, and the contractor's entitlement to receive payment for the works, arises only upon delivery of the property.

100 This liability even extends to instances where the defect/collapse arises out of a defect in the land itself or where the employer consented to the construction of the defective works – see Article 880(2) of the Civil Code. Article 882 of the Civil Code makes Article 880 - 881 mandatory provisions of law and parties to a construction contract are expressly forbidden from contracting out of the obligations imposed by them by terms which purport to limit liability in such instances. Under Article 882, any agreement which purports to limit or exclude liability will be regarded as void. However, a notable problem which may arise is the solvency of the contractor or architect. Whilst such party may liable under the Civil Code, such articles will only serve a purpose if a contractor or architect is able to meet this liability financially. Furthermore, the insurance provisions contained in the Civil Code are at best, basic and unsuitable to effectively manage the unique and intrinsic risks arising out of construction contracts, which require the application of sophisticated and industry specific insurance principles - Anonymous "Construction Law In UAE: A Distinct Body" (01-11-13) *Law Teacher* https://www.lawteacher.net/free-law-essays/contract-law/construction-law-in-uae-a-distinct-body-contract-law-essay.php?cref=1 (accessed 02-07-17).

Stellenbosch University https://scholar.sun.ac.za

Article 890(2) however confirms that, as is expected, the contractor remains responsible to the employer for work performed by the subcontractor.[101]

Section 4 of Part 1 provides for instances in which construction contracts may be terminated and provides that such contracts may only be terminated when:

1. The agreed work has been completed;
2. The construction contract is cancelled by:
    a. Consent;
    b. An order of the court.[102]

In circumstances where performance is prevented, either party may require that the contract be cancelled or terminated. Should performance be prevented due to a cause that is no fault of the contractor, the contractor will be entitled to be paid the value of work completed and expenses incurred. Article 896 makes provision for the consequences of the death of a contractor.

2 4 Comparison

Whilst the definition of the *locatio conductio operis* and a *muqawala* are not entirely congruent, relevant parallels can, for comparison purposes, most certainly be drawn. Both UAE law and South African law recognise that these contracts are subject to the general principles of contract law including validity requirements such as consensus, possibility of performance and lawfulness.[103]

Both systems also do not require, as a formality, that contracts be reduced to

---

[101] Article 891 endorses the concept of privity of contract and confirms that the subcontractor will not have a direct claim for payment against the employer except in instances where the contractor has assigned such payment rights to the subcontractor.

[102] Note that these termination provisions are specifically applicable to *muqawala*.

[103] Interestingly, Article 141 of the Civil Code says parties need only to agree on the essential elements of the obligation for valid contract conclusion and, matters of detail can be agreed upon at a later date. This is in contrast to South African law, where, in general such an arrangement may be viewed as unenforceable as "an agreement to agree". However, in light of certain court decisions (see for example *Van Aardt v Galway* 2012 (2) SA 312 (SCA) 16 - 17), this approach has become qualified and, "legal consequences may attach to partial consensus...the mere fact that an agreement envisages the execution of a formal contract document at a later stage as a memorial of the transaction does not imply that the agreement is void as an agreement to agree." See Van Huyssteen et al *Contract: General Principles* 220 & 222. Arguably, there is also a possibility that, whilst negotiations continue on unresolved matters, a partial agreement may become binding on the parties - see Van Huyssteen et al *Contract: General Principles* 59.

Stellenbosch University https://scholar.sun.ac.za

writing, despite the industry norm in both jurisdictions, for parties to do so. Subject to few mandatory provisions under the Civil Code, parties under both systems enjoy a fair degree of latitude to contract out of terms implied *ex lege*.

Both systems recognise these contracts as reciprocal and under both systems, a contractor's entitlement to receive payment arises only upon completion of the works, unless there is agreement to the contrary. Both systems recognise and allow for subcontracting. Unlike under UAE law, under South African law there is no specific mandatory provision for decennial liability. In contrast, a contractor will be held liable for the lifetime of the works for any defects which may manifest. However, parties are entitled to contract out of such liability (decennial or otherwise) by making the defects liability period much shorter. Under both systems, the contractor bears the risk until the works are complete and the employer has accepted delivery.[104]

It is also notable to highlight that under South African law, a contract of *locatio conductio operis* is terminated in the same manner as an ordinary contract.[105] Such cancellation on account of breach occurs extra judicially, and parties approach the courts to enforce the consequences ensuing because of such cancellation. However, under UAE law such contracts can only be terminated when the agreed work has been completed or where the *muqawala* is cancelled by consent[106] or, by

[104] See Article 884 of the Civil Code.

[105] For example, by mutual agreement, a discharge of mutual obligations by performance, operation of law (e.g. supervening impossibility) or by means of a unilateral act in the case of voidable contracts and a breach of contract. In instances where this cancellation is on account of breach, this right can only lawfully be exercised when "the default of the other party is of a particular serious nature and goes to the 'root' of the contract". *Swartz and Son (Pty) Ltd v Wolmaransstad Town Council* 1960 (2) SA 1 T. The meaning of "serious" is contentious; subject to debate and conflicting approaches. See for example *Strachan v Prinsloo* 1925 TPD 7090 and *Young v Land Values Ltd* 1924 WLD 216 where it was held cognisance must be given to the value that the innocent party placed on a particular term of the contract, and whether that innocent party would have entered into the contract if it had foreseen the eventual malperformance. See also *Singh v McCarthy Ltd t/a McIntosh Motors* 2000(4) SA 795 SCA, it was held that the breach needs to be so serious that it would only be fair to allow the innocent party to resile and undo all the consequences of the contract. See T Naude "Termination of Obligations" in D Hutchison & CJ Pretorius (eds) *The Law of Contract in South Africa* 387 387.

[106] To avoid obtaining a court order, most parties include cancellation provisions in the *muqawala* and, in addition, specifically include a waiver that a court order is not necessary to effect termination. Grose *Construction Law in the United Arab Emirates and the Gulf* 186.

Stellenbosch University https://scholar.sun.ac.za

an order of the court.[107]

Under South African law, a contractor is obliged to execute the works in a "proper and workmanlike manner" and materials used by the contractor must be "of sound quality and fit for their designated purpose".[108] This is in contrast to UAE law where a contractor is obliged to complete the works in accordance with the conditions of the agreed contract.

Therefore, despite differences in approach and the existence of interesting anomalies, sufficient parallels can be drawn between the approach to the *locatio conductio operis* under South African law and the approach to *muqawala* under UAE law to make a comparative analysis of the treatment of self-help remedies (as a way to compel specific performance), a meaningful exercise.

2 5 Conclusion

Construction contracts under both UAE law and South African law are subject to the same general underlying principles of contract law. Under South African law, apart from the notions of consensuality and reliance, freedom and the sanctity of contract, good faith and privity of contract have been portrayed as cornerstones of the law of contract.[109] Similarly consensuality, freedom, privity and sanctity of contract are recognised and upheld under UAE law and, as far as is possible, the courts will give due regard to these cornerstones of contract.

Under UAE law, freedom and sanctity of contract is recognised in Article 265(1) of the Civil Code.[110] This Article says:

> "If the wording of a contract is clear it may not be departed from by way of interpretation to ascertain the intention of the parties."

In addition, Article 267 of the Civil Code says:

---

107 See Article 892 of the Civil Code.

108 See notes 72 and 93.

109 Van Huyssteen *Contract: General Principles* 10; Hutchison "The nature and basis of contract" in *The Law of Contract in South Africa* 21-33.

110 Also see for example, Article 267 of the Civil Code which says: "if the contract is valid and binding, it shall not be permissible for either of the contracting parties to resile from it, or to vary or cancel it, save by mutual consent or an order of the court, or under a provision of the law."

Stellenbosch University https://scholar.sun.ac.za

> "if the contract is valid and binding, it shall not be permissible for either of the contracting parties to resile from it, or to vary or cancel it, save by mutual consent or an order of the court, or under a provision of the law."

Under South African law, individuals also enjoy the autonomy to freely enter into contracts with whom they wish and on agreed consensual terms of contract (subject to societal values).[111] In such instances, the principle of *pacta servanda sunt* requires the enforcement of such contractual obligations - a consequence of this autonomy is that the contractant must accept responsibility for its actions.[112]

The notion or principle of good faith is relevant to both jurisdictions. There is a good faith requirement contained in Article 246 of the Civil Code relevant to (especially the performance stage) all contracts.[113] This is one of the marked differences between civil law and common law systems.[114] Article 246 says:

> "The contract must be performed in accordance with its contents, and in a manner consistent with the requirements of good faith."

There is no prescriptive description of good faith and the courts will deliberate each matter on a case-by-case basis. This lack of certainty may make some uneasy, but it is this very lack of definition which allows the courts to balance the rights of the parties and to achieve justice between them, on an objective standard, outside of the contract, precedent and legislation.[115]

Although good faith has historical roots in South African law, the precise nature, scope and application of good faith "as an independent principle of the law of contract is … a thorny issue."[116] What is clear is that, at least in the view of the Supreme Court of Appeal, there is no general duty of good faith in South African law.[117] As a result good faith does not provide an independent basis for striking

---

111 Van Huyssteen *Contract: General Principles* 11.

112 11.

113 Especially the execution/performance stage of the contract.

114 Grose *Construction Law in the United Arab Emirates and the Gulf* 49. Grose continues to say: "In the latter [common law systems], a duty of good faith has no overarching role and indeed, only a limited role outside a specific statutory or contractual context."

115 Grose *Construction Law in the United Arab Emirates and the Gulf* 50. Guidance can be found at Article 106 of the Civil Code "The Abuse of Rights" which provides for instances when the exercise of a right may be regarded as unlawful; these instances may be taken into account when considering whether an action absences good faith.

116 Van Huyssteen et al *Contract: General Principles* 14.

117 *Brisley v Drotsky* 2002 (4) SA 1 (SCA); *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA); *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323(SCA); *Bredenkamp v*

Stellenbosch University https://scholar.sun.ac.za

down contractual terms or interfering in the enforcement of a contract.[118] Good faith, as a underlying value of the law of contract, informs legal rules and concepts. As a result, good faith plays an important role in determining whether a contract (or contractual provision) is contrary to public policy or not.[119] In this regard, it is not clear whether the operation of good faith can result in the development of novel *naturalia* into construction contracts or provide a basis for the importation of a tacit term into a particular transaction is not altogether clear,[120] but this falls outside the scope of this enquiry.[121]

Good faith, consensuality, privity, sanctity and freedom of contract are the cornerstone of any developed system of contract law. These underpin the right of an aggrieved party to demand specific performance by a defaulting party and, such principles should be at the forefront of any judicial decision regarding an award for specific performance. To this we will now turn to specific performance in the context of construction contracts.

Standard Bank of South Africa Ltd 2010 (4) SA 468 (SCA); *Potgieter v Potgieter NO* 2012 (1) SA 637 (SCA).

118 Van Huyssteen et al *Contract: General Principles* 30.

119 *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at 15; *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) 27.

120 See for example *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA).

121 The resolution of the apparent differences of opinion between the Supreme Court of Appeal and the Constitutional Court - which is seemingly willing to afford the standard of good faith a more direct legal operation, also falls outside the scope of this enquiry, but in this regard, see for example: *Brisley v Drotsky* 2002 (4) SA 1 (SCA) 11 - 24, *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) 169, *Barkhuizen v Napier* 2007(5) SA 323 (CC) 70 -73, *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) 22. See also Van Huyssteen et al *Contract: General Principles* 34.

Stellenbosch University https://scholar.sun.ac.za

Chapter 3

Specific Performance

3 1 Introduction

Specific performance - performance *in forma specifica* - is a remedy used for breach of contract which, with the assistance and backing of the court, seeks to compel a defaulting party to complete its obligations agreed under the contract; it is performance of that on which the parties to the contract have agreed.[122] The purpose of this remedy is to "give the plaintiff exactly what has been agreed upon, thereby avoiding any difficulties with calculating the worth of performance or assessing available alternatives."[123]

Whether an order for specific performance is available as a remedy, and the ease with which an aggrieved party will obtain it, are largely dependent on the legal jurisdiction in which the claim is brought. Three approaches can be discerned in this regard. The first is to recognise specific performance as the primary remedy for breach of contract, subject to certain exceptions. A second approach is to acknowledge specific performance as a discretionary remedy that is available only in exceptional circumstances. A final variant is a hybrid approach which amalgamates elements of the first two approaches.[124]

Locatio conductio operis is subject to the general principles of contract law, and hence also to the principles regarding specific performance.[125] This dissertation is concerned with self-help mechanisms in the context of the construction relationship. A first question relates to the question why an aggrieved party may find it to be in its own interests, to deploy its own mechanisms to coax a defaulting party to comply

---

122 Van Huyssteen et al *Contract: General Principles* 367. The remedy of specific performance is, in most instances a two step approach: the first step is for the innocent party to obtain a court order directing the defaulting party to perform and, the second step entails executionary measures compelling performance from the defaulting party in instances where there is failure to comply with the court order.

123 A Beck "The Coming of Age of Specific Performance" (1987) 20 *CILSA* 190. See also Beletskaya *Development of the Contractual Remedies* 39 – 40 regarding the advantages and disadvantages of specific performance.

124 Van der Merwe *A Comparative Evaluation* 2.

125 195.

Stellenbosch University https://scholar.sun.ac.za

with its performance obligations under a contract.[126] To this end it is necessary to first examine the availability of specific performance as a general remedy under UAE law and South African law and more particularly the willingness of courts to order specific performance in respect of construction contracts.

3 2 Specific Performance as a Remedy in South African Law

3 2 1 A Hybrid Approach

The approach of the South African courts to specific performance has evolved over a period of time, with influences from external jurisdictions; it is, both less clear and more complicated than that of the UAE.

The approach to an order for specific performance under South African law can be defined as a hybrid one; demonstrating the Roman Dutch law approach where a plaintiff is entitled, as a primary remedy, to an order for specific performance[127] but, recognising at the same time that this right is not absolute and subject to the discretion of the court; indicating an English Common Law influence.[128] In summary, under South African law, [t]here is an automatic right to claim, but no automatic right to receive specific performance.[129]

The existence of this remedy and the corresponding right of the plaintiff to elect to claim specific performance as a primary remedy (as recognised by Roman Dutch law) was recognised from early on in South African law[130] and was famously articulated in *Cohen v Shires McHattie and King*[131] by Kotzé CJ where the following was held:

> "By the well-established practice of South Africa, agreeing with the Roman Dutch Law, suits for specific performance are matters of daily occurrence."

126 In legal systems adopting the second approach, the need to resort to self-help remedies to compel specific performance is more easily understood than in systems which adopt the first (or even the third) approach.

127 Note that according to early Roman law, specific performance was not available to an aggrieved contractant and the defaulting party could only be ordered to pay a sum of money, confining the remedy to damages – Beck (1987) *CILSA* 191.

128 H Dondorp "Decreeing Specific Performance: A (Roman) Dutch Legacy" (2010) 16 *Fundamina: A Journal of Legal History* 40.

129 Beck (1987) *CILSA* 195.

130 Van Huyssteen et al *Contract: General Principles* 369.

131 1882 1 SAR 41.

Stellenbosch University https://scholar.sun.ac.za

This was confirmed by Innes J in *Farmers' Co-operative Society (Reg) v Berry:*[132]

> "Prima facie every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party , so far as it is possible a performance of his undertaking in terms of the contract."[133]

This exemplifies the well-known maxim of *pacta sunt servanda,* which is given due regard in South African law and which provides that contracts freely entered into must be upheld and honoured.[134] An aggrieved party is therefore well within its rights to insist on performance by the defaulting party, provided that it is prepared and ready to perform its own reciprocal obligations.[135]

In the flagship decision of *Haynes v Kingwilliamstown Municipality*[136] ("*Haynes*") De Villiers AJA confirmed the right of the aggrieved party to claim specific performance as a primary remedy, but emphasised that this right was not unqualified, but was subject to the discretion of the court:

> "It is equally settled law with us that although the Court will as far as possible give effect to the Plaintiff's choice to claim specific performance it has a discretion in a fitting case to refuse to decree specific performance and leave the plaintiff to claim and prove his id quod interest."

In respect of this discretion, AJA De Villiers AJA went on to say:

> "The discretion which a Court enjoys although it must be exercised judicially is not confined to specific types of cases, nor is it circumscribed by rigid rules. Each case must be judged in light of its own circumstances."[137]

3 2 2 The Crystallisation Problem

The introduction of a discretionary element regarding the availability of specific performance in South African law is derived from English law, where, in contrast to Roman Dutch law, there is reluctance to compel specific performance of contractual

---

132 1912 AD 343.

133 350. See also *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A)) where it was confirmed at 378 "that in our law a plaintiff has the right of election whether to hold defendant to his contract and claim performance by him of precisely what he had bound himself to do, or to claim damages for the breach. (*Cohen v Shires, McHattie and King* 1882 1 SAR 41*)"*.

134 Van der Merwe *A Comparative Evaluation* 4.

135 Van Huyssteen et al *Contract: General Principles* 374. Note, as a consequence, that a defaulting party does therefore not have the right to elect to pay damages in lieu of performing what it has contractually undertaken to do. *See BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 1 SA 391 (A) 433 "Die skuldenaar is nie geregtig om ter eie keuse skadevergoeding as surrogaat van die prestasie aan te bied".

136 1951 (2) SA 371 (A) 378.

137 *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A) 378.

Stellenbosch University https://scholar.sun.ac.za

obligations where payment of damages would suffice. An order for specific performance is an exceptional remedy awarded only in instances where it would be equitable to do so.[138]

> "In like manner the Common Law of England made no attempt actually to enforce the performance of contract but gave to the injured party only the right to satisfaction for non-performance."[139]

The approach of the English Common Law heavily influenced the application of the approach under Roman Dutch law, largely qualifying the plaintiff's right to an order for specific performance as a primary remedy. The right to specific performance was to be subject to the discretion of the court (which discretion was recognised from early on).[140] The English influence went further, however, in so far as a tendency developed for courts to refuse to make an order for specific performance in particular situations.[141]

As a result, the following position, as precisely summarised by Cockrell, was reached:[142]

> "The Roman-Dutch right to specific performance, affirmed as part of modern South African law, was effectively negated by the courts' subsequent endorsement of crystallised instances – borrowed from English Law – in which specific performance should be refused."

The conflict between the approach under Roman Dutch law and English law and the resultant tendency for the closing off of the court's discretion was addressed in *Haynes*. Here the court affirmed a move away from the rigid rules (stemming from English law) which had become unofficially and strictly applicable in particular

---

[138] Van Huyssteen et al *Contract: General Principles* 370.

[139] Sir Edward Fry, quoted in Beck (1987) *CILSA* 191. See also Van der Merwe *A Comparative Evaluation* 3: "The essence of the modern common law doctrine is thus that failure to perform/breach of contract will be compensated with the value of the expectancy that was created by the promise of the other party (i.e. expectation damages); only when awarding damages is inadequate will it be in the discretion of the court to grant specific performance".

[140] For example, in *Shakinovsky v Lawson and Smulowitz* 1904 TS 362 330 Innes CJ held: "a plaintiff has always the right to claim specific performance of which the defendant has refused to carry out, but it is in the discretion of the court either to grant such an order or not."

[141] Van Huyssteen et al *Contract: General Principles* 369. See also Beck (1987) *CILSA* 192 where certain categories are listed with the comment that if a "contract fell within one of these categories the outcome of a claim for specific performance could be predicted with reasonable accuracy."

[142] A Cockrell "Breach of contract" in: R Zimmermann & D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 303 329; cf Van der Merwe *A Comparative Evaluation* 9.

Stellenbosch University https://scholar.sun.ac.za

instances when an aggrieved party approached the court for specific performance. Unfortunately, the court in *Haynes* was not completely effective in addressing this tension. It largely negated its attempted clarification by listing examples where this discretion to refuse specific performance had been exercised in the past:

> "As examples of the grounds on which the Courts have exercised their discretion in refusing to order specific performance, although performance was not impossible may be mentioned: (a) where damages would adequately compensate the plaintiff; (b) where it would be difficult for the Court to enforce its decree (c) where the thing claimed can be readily bought anywhere; (d) where specific performance entails rendering services of a personal nature. To these may be added examples given by Wessels on Contract (vol 2, s3119) of good and sufficient grounds for refusing the decree, (e) where it would operate unreasonably hardly on the defendant, or where the agreement giving rise to the claim is unreasonable, or where the decree would produce injustice, or would be inequitable under all the circumstances."[143]

The listed circumstances were largely remnants of the rigid circumstantial rules applied by the English courts; many of which had already proven to be illogical,[144] but they again became grounds for the refusal of specific performance in subsequent decisions[145] - thus negating the attempt to re-establish the judicial discretion. This formulaic application of what was supposed to be factors relevant to the exercise of the judicial discretion did not escape criticism from the Appellate Division,[146] but until *Benson v SA Mutual Life Assurance Society*[147] ("*Benson*") there was, for a long period of time, unfortunately no single decision which provided clarity on the matter.

3 2 3 The Discretionary Approach Restored: *Benson*

The discretionary approach of South African law was confirmed in the current leading decision of the Appellate Division in *Benson*, with the court also confirming the observation of the maxim *pacta sunt servanda* – an obligation should be able to

---

143 *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A) 378-379. These circumstances can be divided roughly into two categories: the first concerns practical considerations relating to the supervision of performance and the enforcement of contracts involving personal services and the second relates to the "function of contractual remedies in the economic system" - Lubbe & Murray *Farlam and Hathaway: Contract: Cases, Materials and Commentary* 542.

144 Beck (1987) *CILSA* 197.

145 See for example Beck (1987) *CILSA* 197 - 198.

146 199. See e.g. the remarks of Jansen JA in I*sep Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co Pty Ltd* 1981 (4) SA 1 (A) and Van Heerden AJA 913C in *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Backereien (Pty) Ltd* 1982 (3) SA 893 (A).

147 1986 (1) SA 776 (A).

Stellenbosch University https://scholar.sun.ac.za

be enforced on the terms agreed[148] and, importantly, as decided in previous decisions,[149] emphasised the right[150] of an aggrieved party to elect whether to demand performance or sue for damages.[151]

Most importantly, the judgment in *Benson* confirmed the court's discretion as paramount when deciding whether to make an award of specific performance. In addressing the reconciliation of the right to specific performance with the notion of a judicial discretion to derogate from it, Hefer JA portrayed the right as the cornerstone of our law and went on to say:

> "Once that is realised, it seems clear, both logically and a matter of principle, that any curtailment of the Court's discretion inevitably entails an erosion of the plaintiff's right to performance, and that there can be no rule, whether it be flexible or inflexible, as to the way in which the discretion is to be exercised which does not affect the Plaintiffs right in some way or another…no rules can be prescribed to regulate the exercise of the Court's discretion."[152]

However, the court also stressed that this discretion is a judicial discretion and is not completely unfettered; it must, in the words of the court not "be exercised capriciously, nor upon a wrong principle."[153] The discretion, it was held:[154]

> "is aimed at preventing injustice for cases do arise where justice demands that a plaintiff be denied his right to performance – and the basic principle thus is that the order which the Court makes, should not produce an unjust result which will be the case e.g. if, in the particular circumstances, the order will operate unduly harshly to the defendant."

This means that equitable[155] and policy considerations[156] are highly relevant to its exercise.

---

[148] Beck (1987) *CILSA* 206. See also *Botha v Rich NO* 2014 (4) SA 124 (CC) 141 where Nkabinde J held that "The starting point is that at common law a contracting party is entitled to specific performance in respect of any contractual right."

[149] The court made reference to *Cohen v Shires, McHattie and King* 1882 1 SAR 41, *Thompson v Pullinger* 1 OR 298 at 301, *Woods v Walters* 1921 AD 303 309, *Shill v Milner* 1937 AD 101 109 and, more recently *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 392 433.

[150] See in this regard: G Lubbe "Contractual Derogation and the Discretion to refuse an Order for Specific Performance" in G Glover (ed) *Essays in Honour of AJ Kerr* (2006) 77 84.

[151] *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) 782.

[152] 782 – 783.

[153] 783.

[154] 783.

[155] *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A). See also Wessels & Roberts *The Law of Contract in South Africa* 831 para 3119 who refer to instances where an order for specific performance would result in injustice or would be inequitable under all circumstances.

[156] Van Huyssteen et al *Contract: General Principles* 370.

Stellenbosch University https://scholar.sun.ac.za

That an order of specific performance would bring undue hardship on the defaulting party[157] is accordingly often at the forefront of an argument for the refusal of an award for specific performance.[158] The facts of *Haynes* are also a good example of where should the court have awarded specific performance, an unjust result would have been brought about.[159] The fact that the agreement giving rise to the claim is unreasonable,[160] might also move a court to exercise its discretion in favour of the defendant. These considerations must, however, be balanced with the rights of the aggrieved party to receive the performance which the defaulting party has contractually undertaken to perform.[161]

Apart from considerations of hardship, policy considerations regarding the prevention of economic waste require that an order for specific performance be refused in instances of impossibility. In *Benson*[162] the court held:

> "Furthermore, the Court will not decree specific performance where performance has become impossible. Here a distinction must be drawn between the case where impossibility extinguishes the obligation and the case where performance is impossible but the debtor is still contractually bound. It is only the latter type of case that is relevant in the present context, for in the former the creditor clearly has no remedy at all".

157 Wessels & Roberts *The Law of Contract in South Africa* para 3119.

158 An example of this can be seen in the case of *City of London v Nash* Eng. Rep 859 (1747); the defendant had constructed two new buildings and repaired others (instead of replacing the old buildings with newly constructed buildings as per the agreement), the court did not make an order for specific performance as such an order, to tear down repaired buildings and replace them with newly constructed buildings, would result in an undue hardship for the defendant - G Lennard "Specific Performance of Construction Contracts – Archaic Principles Preclude Necessary Reform" (1972) 47 *Notre Dame L. Rev.* 1025 1034.

159 Briefly, the facts were as follows: The Municipality of Kingwilliamstown had entered into an agreement with Haynes to release (daily) a pre-agreed amount of water to Haynes. The Municipality defaulted under the agreement and released less water than what was obliged under the agreement; this was due to an unprecedented drought. However, if the municipality complied with what was required under the agreement and released the amount of water which was agreed, it would have resulted in great hardship, danger to the health of the community and disruption to the town. The Appellate Division upheld the decision of the court a quo agreeing that in such instances, it was just for the court to exercise judicial discretion and to refuse an order for specific performance.

160 Wessels & Roberts *The Law of Contract in South Africa* para 3119.

161 See *Edrei Investments 9 Ltd v Dis-chem Pharmacies (Pty) Ltd* 2012 (2) SA 553 (ECP) where it was held "The respondent contends that it is trading continually at a loss and accordingly an interdict [compelling specific performance] would operate too harshly against it…it appears that the contract which it has concluded is not as lucrative as it had intended. That occurs frequently in business, but it does not entitle the respondent to walk away from its contractual obligations. To refuse an interdict would render nugatory the applicants right to elect to hold the respondent to its contract. It would effectively grant the Respondent the right to choose whether to pay damages or to honour its contractual obligations."

162 1986 (1) SA 776 (A) 783 - 784.

Stellenbosch University https://scholar.sun.ac.za

Such impossibility must, however, be a "true" impossibility, albeit of a subjective nature: mere inconvenience to the defaulting party will be insufficient.[163] Related to the case of impossibility of performance in this sense, are instances of so-called hardship breach, where a denial of specific performance would require the plaintiff restricted to a claim for damages to mitigate loss by buying substitute goods available elsewhere.[164] Specific performance will on the grounds of policy underlying the *paritas creditorum* rule also not be granted where the debtor is insolvent.[165]

The principal implication of the judgment in the *Benson* case is the rejection of the tendency of the courts to refuse orders for specific performance as a matter of course in a number of crystallised instances. One such "rule" that has been rejected is the longstanding conception that specific performance should be denied if monetary compensation in the form of damages[166] would adequately compensate the aggrieved party.[167] In construction contracts, for example, it is commonly asserted that an aggrieved party, upon receiving damages could easily contract with a third to perform the construction work.[168] However, the fact that the aggrieved party is requesting, in the first instance, specific performance, insinuates that a claim for damages is an inadequate remedy[169] and this rule was therefore expressly (and rightfully) rejected in *Benson*:[170]

---

163 Lubbe "Contractual Derogation" in *Essays in Honour of AJ Kerr* 5.

164 See generally Lubbe & Murray *Farlam and Hathaway: Contract: Cases, Materials and Commentary* 549.

165 *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) 783; *Administrator, Natal v Magill, Grant & Nell (Pty) Ltd (In Liquidation)* 1969 (1) SA 660 (A).

166 See Van Huyssteen et al *Contract: General Principles* 368 on the distinction between an award or damages that compensates the aggrieved party for loss suffered as a result of a breach and an award of the objective value of the performance as a surrogate for an outstanding performance

167 See for example, *Thompson v Pullinger* 1894 1OR 298.

168 Another reason is because "expanding the availability of specific performance would create opportunities for promisees to exploit promisors by threatening to compel, or actually compelling, performance, without furthering the compensation goal" – A Schwartz "The Case for Specific Performance" (1979) 1118 *Yale Law School Legal Scholarship Repository Scholarship Series Faculty Scholarship Series* 274.

169 Schwartz (1979) *Yale Law School Legal Scholarship Repository Scholarship Series* 277. An aggrieved party cannot rest assured that it will receive damages in an adequate sum in lieu of specific performance. This is compounded by the fact that it is extremely difficult to accurately quantify such damages under a construction contract and the aggrieved party may well be better off deploying self-help remedies to urge the defaulting party to perform as agreed.

170 This was confirmed in *Santos Professional Football Club (Pty) Ltd v Igesund* 2003 (5) SA 73 (C) and *Nationwide Airlines (Pty) Ltd v Roediger* 2008 1 SA 293 (W).

Stellenbosch University https://scholar.sun.ac.za

> "The most important rule from which many of the others were derived, was that specific performance would not be granted where the plaintiff could be compensated adequately by damages…There is no need nor reason for this process to continue."

A resort to specific performance in instances where the order will require the performance of services of a personal nature,[171] has traditionally been met with scepticism by the courts. In *Troskie v Van der Walt*,[172] for instance, it was held:

> "no court, for example, can force a singer to sing or an artist to paint a picture because these tasks require the application of highly personal skills" (211 F-I)."

Nevertheless, even in the period before *Benson's* case, the law reports reveal an tendency towards a more flexible approach. An order for specific performance of an employment contract against an employer (i.e. the reinstatement of an employee) was confirmed in *National Union of Textile Workers v Stag Packings (Pty) Ltd.*[173] There has be an indication in case law that courts, in exercising judicial discretion, may (as so entitled) refuse to make an order for specific performance.[174] However, in line with legislation,[175] it is becoming more of a trend for courts (in particular the labour courts) to recognise the right of an employee to remain employed.[176]

Alternatively, an order compelling specific performance by an employee under a contract of employment has been a hotly debated topic after the landmark decision

---

171 As would be the case under a contract of employment (*locatio conductio operarum*). See Van der Merwe *A Comparative Evaluation of the Judicial Discretion to Refuse Specific Performance* 163. On the distinction between *locatio conductio operis* and *locatio conductio operarum*, see the discussion in Chapter 2 – "The Construction Contract under UAE law and South African law in context: an overview".

172 1994 (3) SA 545 (O). See also *Lumley v Wagner* (1852) 1 De GM & G 604 and *Roberts Construction Co Ltd v Verhoef* 1952 (2) SA 300 (W). Parallels can be drawn with a construction context, in, for example, instances of design where the aggrieved party has elected a particular architect or engineer to design a certain element of a project or particular works. It is imperative, due to the creative element that is unique to a particular individual, that that particular elected individual performs the design element as there is no other who can perform the required design to the same degree and in the same manner.

173 1982 (4) SA 151 (T) the court held that there was no reason why the general rule that an innocent party could elect to hold a defaulting party to its contract could not also be applicable to employment contracts.

174 See for example *Seloadi v Sun International (Bophuthatswana) Ltd* 1993 (2) SA 174 (BG) 186I-190E and *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) where the court, in exercising its judicial discretion refused to make an order for specific performance.

175 This is in line with labour legislation namely the Labour Relations Act 66 of 1995 at section 193 and the Basic Conditions of Employment Act 75 of 1997 at section 77A(e) - Van der Merwe *A Comparative Evaluation* 177.

176 Van der Merwe *A Comparative Evaluation* 177.

Stellenbosch University https://scholar.sun.ac.za

given by a full bench of the Cape Provincial Division in *Santos Professional Football Club (Pty) Ltd v Igesund* ("*Santos*")[177] where a football coach was ordered to complete his fixed term contract as head coach. This was the first case where an order for specific performance was granted against an employee[178] and this decision was subsequently confirmed in *Nationwide Airlines (Pty) Ltd v Roediger*[179] where it was held that:

> "[I]t is apparent that it is a misconception to say without qualification that specific performance of an employment agreement will never be permitted. There are numerous situations, where specific performance may be ordered where various factors may play a determining role in coming to such a decision… The general rule should still be that where a party wrongfully breaches a contract, it should entitle the innocent party to enforce the contract and, that should no less be so even in employment contracts. After all as the authorities have laid down, each case must be decided on its own facts."

A third instance in which our courts have in the past tended to refuse orders for specific performance was where the execution of the order for specific performance would supposedly prove difficult for the court.[180] This ground is especially prevalent in construction contracts, and will be considered in more detail in the following section.

In respect of The *Benson* judgment generally, it is clear that it has provided much needed clarity in confirming a move away from the rigid application of the law by the courts when considering an order for specific performance, making it clear that while a right to specific performance is the basic premise of our law, this is subject to a judicial discretion whether to make an order for specific performance. In principle this approach applies to every situation, irrespective of the type of contract that is before the court. The court in *Benson* also confirmed that the circumscribed rules founded in English law were at most to be regarded as factors relevant to the exercise of the discretion and as such, could no longer be accorded an elevated

---

177 2003 (5) SA 73 (C).

178 T Naude "Specific Performance Against an Employee *Santos Professional Football Club (Pty) Ltd v Igesund*" (2003) 120 *SALJ* 269 269. This decision was contrary to the longstanding view (in South Africa and in many other jurisdictions) that an order for specific performance should not be made against an employee. There is a view that such orders are tantamount to slavery as the personal freedom of the employee is compromised.

179 2008 (1) SA 293 (W) 19 21.

180 See the reference to this tendency in *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 (4) SA 1 (A) 5.

Stellenbosch University https://scholar.sun.ac.za

status and be regarded as prescriptive when a court was exercising discretion surrounding the grant or refusal of an order for specific performance.[181]

Furthermore, despite this clear and progressive judgment, the judgment is not beyond criticism and it has been predicted that the attempt to restore the hybrid approach is doomed to failure:[182]

> "[d]espite trying to re-establish the Roman–Dutch position, the court has simply perpetuated the internal incoherence in this area of the law, occasioned by the fusion of the remedy from two dissimilar systems of law."

Nonetheless, whatever the fate[183] might be of *Benson* in the long term, for present purposes, the concern is the impact of the judgment on the approach in the context of construction contracts and, the incentive for the use of self-help remedies (dealt with in the next section) to compel specific performance.

3 2 4 The Position in respect of Construction Contracts

There is an ancient rule (Rule 233) found in the Code of Hammurabi (circa 2250 B.C.) which says:

"If a builder has built a house for someone and has not made its foundations firm, and a wall falls, that builder out of his own money shall make that wall firm".[184]

This is unfortunately no longer the starting point and there has been a shift in thought in many jurisdictions around specific performance as a primary remedy. Sir Guenter Treitel[185] says the following about the remedy of specific performance:

> "First, the enforced performance may be regarded as an undue interference with the personal freedom of the debtor. This is particularly true where performance can only be rendered by the debtor personally; but even where this is not the case enforced performance is often felt to be too strong a measure when the creditor could for most practical purposes be put into almost a good position by an award of a sum of money. Enforced performance might, moreover, cause hardship to the debtor which would not be occasioned by an

[181] *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) 785 "and so it came about that English cases came to be followed somewhat indiscriminately … There is neither need nor reason for this process to continue … This does obviously not imply that … factors which other Courts have considered to be obstacles or possible obstacles in the way of granting an order for specific performance now cease to be pertinent. On the contrary, they remain relevant factors which are to be considered on the same basis as any other relevant fact is to be considered".

[182] See Cockrell "Breach of contract" in *Southern Cross: Civil Law and Common Law in South Africa* 330; Lubbe "Contractual Derogation" in *Essays in Honour of AJ Kerr* 19.

[183] Lubbe "Contractual Derogation" in *Essays in Honour of AJ Kerr* 24.

[184] H Oleck "Specific Performance of Builders Contracts" (1952) 21 *Fordham Law Review* 156 156.

[185] GH Treitel *Remedies for breach of contract: A Comparative Account* 1st ed (1988) 47.

Stellenbosch University https://scholar.sun.ac.za

> award of money, particularly where such an award would be subject to a reduction under mitigation rules. Secondly, enforced performance may be thought to impose strains on the machinery of law enforcement which are too severe when balanced against the benefit derived by the creditor from enforced performance."

The above reasons, reflecting the approach of English law, have especially become entrenched when an award for specific performance is considered in the context of construction contracts.[186] In particular, there seems to be three identifiable and prominent reasons, which have evolved and developed over time, why courts (in all jurisdictions) are reluctant to order specific performance in construction contracts.[187] These reasons can be characterised as follows:

> "First, damages may be an adequate remedy if another builder can be engaged to do the work. Secondly, the contract may be too vague to be specifically enforced if it fails to describe the work to be done with sufficient certainty. And, thirdly, specific enforcement may require more supervision than the court is willing to provide."[188]

Adequacy of damages,[189] is a primary reason why some courts remain hesitant to make an award for specific performance in construction contracts; if the aggrieved party is compensated with a suitable award of damages, the aggrieved party can easily approach a third party to perform promised works.[190]

This reasoning does not come without criticism; the very fact that the aggrieved party has requested the court to order specific performance indicates that an award for damages would be an inadequate remedy in the circumstances.[191] Further, as discussed below, the expense, time and resources to source and contract with a

---

186 Nienaber "Construction Contracts" *LAWSA* 9 para 63.

187 See *Ranch International Pipelines (Transvaal) Ltd v LMG Construction City (Pty) Ltd* 1984 (3) SA 861 W 865 and the references to the New Zealand case of *Mayfield Holdings Ltd v Moana Reef Ltd* [1973] 1 NZLR 309.

188 H Beale "Specific Performance and Injunction" in H Beale (various eds) *Chitty on Contracts* (2015) 27-001 27-032.

189 Traditionally a principle stemming from English law, but which has been assimilated into many other jurisdictions.

190 J Bailey *Construction Law* (2011) 6.03.

191 See Schwartz (1979) *Yale Law School Legal Scholarship Repository Scholarship Series* 277: "…why courts should permit promisees to elect routinely the remedy of specific performance is that promisees possess better information than courts as to both the adequacy of damages and the difficulties of coercing performance. Promisees know better than courts whether the damages a court is likely to award would be adequate because promisees are more familiar with the costs that breach imposes on them. In addition, promisees generally know more about their promisors than do courts; thus they are in a better position to predict whether specific performance decrees would induce their promisors to render satisfactory performance."

Stellenbosch University https://scholar.sun.ac.za

new contractor are extensive and very difficult, nor are damages always effectively quantified to reimburse the aggrieved party for all the expense it may face, both directly and indirectly, when appointing a new contractor.

Another supposed reason why there is a reluctance by some courts to make an order for specific performance is the difficulty of supervision. The court does not have the technical expertise nor resources to supervise the execution of the works, nor is the court able to confirm that the work has been performed in accordance with the requirements of the construction contract. This factor is compounded by the fact that should a party wilfully fail to comply with an order for specific performance, the defaulting party may well face criminal prosecution for contempt of court.[192]

> "If the Court did decree specific performance, it would have to punish for contempt of court if the work were not properly performed, and this would involve direct superintendence of the work by an officer of the court, a proceeding for which manifestly a court of law is not suited."[193]

The phenomenon of supervision stems from English law when English Chancellors were trying to establish the separate jurisdiction of Chancery; in order to uphold the dignity of the court, they avoided making any orders which they were not certain they would be able to enforce.[194] Consequently, the courts avoided making orders for affirmative action beyond a single act,[195] and if performance required detailed acts of a continuing nature, then supervision was required. The effect of this was as follows:

> "This idea had two consequences: because the court sought to avoid prolonged supervision which its ordinary means and instrumentalities might not be able to carry out, it became prejudiced against the idea of specific performance of construction contracts. In addition, a prejudice developed against all affirmative decrees involving more than a single, simple act, and at the same time the court tended to prefer negative decrees wherever possible."[196]

---

192 Lubbe & Murray *Farlam and Hathaway: Contract: Cases, Materials and Commentary* 542. See also *Van der Westhuizen v Velenski* (1898) 15 SC 237 and *Putco Ltd v TV and Radio Guarantee Co (Pty) Ltd* 1985 (4) SA 809 (A).

193 Wessels & Roberts *The Law of Contract in South Africa* para 3124.

194 Oleck (1952) *Fordham Law Review* 156. See also R Pound "The Progress of Law and Equity" (1920) 33 *Harv. L. Rev.* 420 434.

195 Lennard (1972) *Notre Dame L. Rev.* 1027 and, see also *Bakersfield Country Club v. Pacific Water Co.*192 Cal. App. 2d 528, 13 Cal. Rptr.573 (1961).

196 Oleck (1952) *Fordham Law Review* 156 and, as discussed in more detail below, English courts do not usually award specific performance where damages would be adequate; this is

Stellenbosch University https://scholar.sun.ac.za

This concept that specific performance should not be ordered in instances where enforceability will prove difficult for the court, has been maintained for several years by courts and writers alike in South Africa.[197] Wessels[198] says the following:

> "Where the court cannot ensure performance, it will not decree specific performance. A contract which requires constant supervision, or where the duties to be performed are continuous, is not such a contract as the court will order to be specifically performed…Thus, the court will not decree specific performance of a building contract or of a contract to do work or labour."[199]

This resulted in an approach whereby performance was to be detailed and agreed by the parties and a court was merely required to supervise each detail without departing from what had been agreed.[200]

This emphasis on supervision was reproved in South Africa in the prominent case of *Ranch International Pipelines (Transvaal) Ltd v LMG Construction City (Pty) Ltd*[201] at 880[202] where the facts were briefly as follow: Ranch entered into a contract to construct a pipeline and in turn engaged LMG Construction as a subcontractor on the project. Ranch alleged that the subcontract had been terminated and brought an application to expel LMG from the site and to restrain LMG from entering again. LMG in turn brought a counter application for an urgent interdict interdicting VM (the newly appointed subcontractor in place of LMG) from performing the subcontract

---

especially with regard to construction contracts. However, in *Wolverhampton Corporation V Emmons* [1901] 1 KB 515, the court identified that specific performance may be awarded in construction contracts in instances where three conditions are satisfied: "(1) the claimant has a substantial interest such that damages would not compensate them; (2) the defendant is in possession of the land so that the claimant cannot do the work; and (3) the work is adequately particularised". See J Uff *Construction law* 10 ed (2009) 221. See also *Carpenters Estate Ltd v Davies* [1940] 1 Al E.R. 13; V Ramsey & S Furst *Keating on Construction Contracts* 9 ed (2012) 357 and Pound (1920) *Harv. L. Rev.* 434; See also the recent (and rare) decision by the English High Court in *Airport Industrial GP Ltd and Airport Industrial Nominees Ltd v Heathrow Airport Ltd and AP16 Ltd* [2015] EWHC 3753 (Ch) where the court made an order for the specific performance obligations under a construction contract in advance of the completion date.

197 Lubbe & Murray *Farlam and Hathaway: Contract: Cases, Materials and Commentary* 545.

198 Wessels & Roberts *The Law of Contract in South Africa* para 3124.

199 See also *Nisenbaum and Nisenbaum v Express Buildings Ltd* 1953 (1) SA 246 (W) 249 where De Villiers J held: "The judgment in [*Marais v Cloete* 1945 EDL 238] seems to indicate, as I have stated, that as a general rule in disputes between landlord and tenant as to the repair of buildings, or neglect to repair or failure to carry out some structural alterations, the court will not order specific performance because it is a difficult matter for the court to supervise and see that its order is carried out, and as a question whether there has been specific performance of the court's order was difficult to determine, it would be difficult to enforce it".

200 Pound (1919) *Harv. L. Rev* 434.

201 1984 (3) SA 861 (W).

202 See also *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 (4) SA 1 (A) 5.

Stellenbosch University https://scholar.sun.ac.za

works and Ranch from interfering with LMG's right to complete the subcontract works. The counter-application was successful.

Coetzee J famously held the following on the point of supervision:[203]

> "In the process of deciding whether specific performance should be refused…a few general observations about building contracts may first be made. The Court's difficulty of supervising the performance is traditionally in the forefront of the objection to such an order…I wonder if this difficulty is not grossly over-emphasised. Is it not imaginary rather than real? I could not find a case on record where such difficulty actually arose in practice and which had to dealt with by the Court after an order to perform a building contract had been made. Why should there be any difficulty? What is the need of supervision anyway? Does the Court ever supervise the execution of its judgments? Surely not. Orders *ad factum praestandum* are made all the time. There is no supervision thereof and no intervention by the Sheriff. If there is an intentional refusal to perform, contempt proceedings may follow. Why should different considerations apply to building contracts? Accurate performance of them with the requisite skill or workmanship is irrelevant in this context."

Coetzee J further clarified the point that as the order for specific performance and accordingly the judgment do not replace the obligations under the construction contract, there is no new difficulty in establishing whether these contractual obligations have been sufficiently met:[204]

> "The judgment creditor will surely cancel the contract when it is unintentionally incorrectly performed. The judgment does not replace the contract. After all, this risk, as well as that of not succeeding in contempt proceedings, the owner took when he asked the court for this order. It is his affair. If the owner has elected to claim this remedy and he is prepared to take these risks, why, one may ask, should it lie, as a matter of logic, in the mouth of the defaulting builder to advance any reason connected with the quality of his performance or his general unwillingness, as a basis for avoiding an order compelling him to perform his bargain."[205]

---

203 See also *Mayfield Holdings Ltd v Moana Reef Ltd* [1973] 1 NZLR 309 at 321/2 (quoted in *Ranch International Pipelines (Transvaal) Ltd v LMG Construction City (Pty) Ltd* 1984 (3) SA 861 (W) 868 where it was held: There has, I think, been a tendency to discount the second reason [the difficulty of supervision of a detailed building project] as an independent ground for refusing specific performance of a building contract, the view being taken that in the case of modern contracts the details of the structure are specified in detail and may be the subject of effective although inconvenient supervision…"

204 Whilst extremely helpful, this judgment has not resolved the matter in its entirety under South African law and further intervention by the courts on this topic is still required – Van der Merwe *A Comparative Evaluation* 198. See also *Sokoloff v Harriman Estates Development Corp* 2001 NY Int. 97.

205 *Ranch International Pipelines (Transvaal) Ltd v LMG Construction City (Pty) Ltd* 1984 (3) SA 861 (W) 881.

Stellenbosch University https://scholar.sun.ac.za

The same reasoning can be viewed from another angle[206] and this suffices as the third primary reason why courts remain hesitant to make an order for specific performance, namely the court's reluctance stems from the vagueness and imprecision surrounding the contractual obligations of the parties[207] - "one of the stock objections in construction contracts is want of sufficient certainty."[208]

Due to this imprecision, the court may (undesirably) be forced to substitute its own judgment for that of the parties,[209] or the aggrieved party may argue that the defaulting party has failed to comply with its contractual obligations and, in turn, the defaulting party will argue compliance with its obligations under the contract and accordingly compliance with the order for specific performance; as a result further unnecessary and unwanted disputes may arise between the parties.[210]

It is suggested that a way around this, would be for a court to take into account "the question whether fair evaluation of the work and, consequently, satisfactory fulfilment of the contract is possible."[211] It is therefore suggested that firstly the relationship between the parties is taken in to account and secondly, whether evaluation of the performance by the defaulting party is (objectively) possible – if for an example, it is possible and the parties agree that an objective third party professional will evaluate whether the performance is contractually compliant then, this will dispel any arguments of non-performance.[212]

In actual fact, the three grounds as key reasons for the reluctance of the court to make an award for specific performance can be dispelled; minimum supervision (if any) is required by the court, damages rarely adequately compensate the aggrieved party and if contractual obligations are uncertain, mechanisms exist to avoid dispute.

---

206 Van der Merwe *Comparative Evaluation* 196.

207 RH Christie & GB Bradfield *Christie's the Law of Contract in South Africa* 7 ed (2016) 552. See also Wessels & Roberts *The Law of Contract in South Africa* para 3117ff; *Barker v Beckett & Co Ltd* 1911 TPD 151 164.

208 Pound (1920) *Harv. L. Rev*. 433.

209 Lennard (1972) *Notre Dame L. Rev*. 1026.

210 Lubbe & Murray *Farlam and Hathaway: Contract: Cases, Materials and Commentary* 546.

211 546.

212 546.

Stellenbosch University https://scholar.sun.ac.za

Perhaps it can be said that a court's reluctance to order specific performance, does not actually stem from any of the above reasons – the primary reason is an unwillingness to deviate from the well-trodden path of precedent.[213]

Nonetheless, this discretion, as a subjective variable, still gives rise to uncertainty and an aggrieved party cannot have absolute certainty that it will be awarded specific performance. For example, Nienaber says the following:

> "The contractor's breach may entitle the employer to a decree of specific performance".

This statement is then qualified with the following:

> "Such an order will *usually but not necessarily* be refused when it requires the execution of work" (my emphasis).

Consequently, an aggrieved party may be wise to avoid approaching a court for assistance, but instead decide to deploy alternative tactics to compel the defaulting party to perform.

Thus, despite the ruling in *Benson*, this dichotomy serves as a contributing factor for an aggrieved party to pursue self-help remedies to compel specific performance, despite a clear judicial ruling that its' election for specific performance as a primary remedy will be given due regard.

Therefore, an aggrieved party who wishes to compel specific performance from a defaulting contractant is, in many instances, indirectly influenced by these aforementioned circumstances; anticipating that should a court be approached for an order of specific performance where any the aforementioned circumstances exist, the likelihood of such a request being refused and substituted by way of a damages award is probable. This makes reliance on self-help remedies to compel specific performance in such instances attractive to an aggrieved party.

---

213 Lennard (1972) *Notre Dame L. Rev.* 1027.

Stellenbosch University https://scholar.sun.ac.za

3 3 The Approach to Specific Performance as a Remedy in the UAE

3 3 1 How Specific Performance is defined under UAE Law (as a Civil Law System)

The approach taken in many prominent civil law jurisdictions[214] is the first approach - namely that specific performance is a primary remedy subject to certain exceptions. A party is obliged to perform its obligations under a contract and should a party fail to do so (in breach of the contract), the aggrieved party will have the right, as first course of action, to obtain an order compelling the defaulting party to perform and fulfil its obligations under the contract.[215]

In the UAE, and under the Civil Code, specific performance is confirmed as the primary remedy in instances of breach of contract.

Specific performance (also known as "performance by compulsion") should, in the first instance, be ordered for the performance of contractual obligations. The position in the UAE, and indeed in many civil law jurisdictions, is that damages, in lieu of specific performance, should only be awarded in instances where specific performance is not possible; Article 380(1) of the Civil Code provides as follows:

> "(1) An obligor shall, after being given notice, be compelled to discharge his obligation by way of specific performance, if that is possible."[216]

The preference for the execution of an agreement, over substitution with alternative remedies) is in line with Sharia law which has an aversion to anything "speculative" or "intangible".[217] Further, it is common cause that under UAE law neither of the parties can unilaterally elect to substitute such performance with an alternative form of performance:[218]

---

214 See for example Dutch and German law jurisdictions: Van der Merwe *A Comparative Evaluation* 17.

215 Van der Merwe *A Comparative Evaluation* 3.

216 In Abu Dhabi Court of Cassation 1452/2009, the learned judge made reference to the explanatory memorandum of the Civil Transaction Law (at page 384) which says the following: "If the performance of the obligation is possible, the obligor shall have the right to offer performance thereof and such performance may not be replaced by compensation (i.e. taking consideration) without the mutual consent of the parties, because compensation against specific performance may not be regarded as an optional or alternate obligation..."

217 Grose *Construction Law in the United Arab Emirates and the Gulf* 202.

218 This extends to compensation and a party cannot unilaterally elect to substitute performance

Stellenbosch University https://scholar.sun.ac.za

> "The obligor has the duty to tender performance exactly, and the obligee has the duty to accept such performance. The obligor does not have the right to tender cash as an alternative, so long as specific performance remains feasible."[219]

3 3 2 Circumstances when an Award of Specific Performance may be Departed from under UAE Law[220]

3 3 2 1 Impossibility

A court may only depart from an award of specific performance in certain and prescribed circumstances. The "possibility" or "tenability" of the performance is one of the key factors in determining whether an alternative to specific performance is permissible. This is confirmed by Article 386 as read with Article 380(1) of the Civil Code, which states:

> "If it is impossible for an obligor to give specific performance of an obligation, he shall be ordered to pay compensation for non-performance of his obligation, unless it is proved that the impossibility of performance arose out of an external cause in which (the obligor) played no part. The same shall apply in the event that the obligor defaults in the performance of his obligation (my emphasis)."

Islamic jurisprudence dictates that if an obligation becomes impossible, a substitute must be offered.[221] This is subject to the exception that if the impossibility has arisen out of a cause in which the obligor played no part, then the obligor is exempt from

---

with compensation; compensation is therefore not a voluntary alternative obligation for the obligor nor remedy for the obligee. Note however, parties may elect to substitute such performance by agreement - See J Whelan *UAE Civil Code and Ministry of Justice Commentary* (2010) 2:0558.

[219] Whelan *UAE Civil Code and Ministry of Justice Commentary* 2:0558.

[220] In Abu Dhabi Court of Cassation 987/Judicial Year 3 it was held that "The subject matter of the obligation will remain in place, namely the specific thing that the obligor has to do, and the other part of it is the compensation laid down by the law in lieu of it. It follows from that that if the obligee has demanded specific performance and it is established before the judge that that is not possible or would oppressive to the obligor, then the court will do no wrong in awarding compensation. That will not be regarded as a judgment for something that was not applied for by the party, because there is a presumption in an application for specific performance that it implies within itself an application for compensation in the event that specific performance is not possible".

[221] Whelan *UAE Civil Code and Ministry of Justice Commentary* 2:0558. See also Dubai Court of Cassation 76/2009 where it was held: "Under Articles 385 and 386 of the Civil Code, if special performance of an obligation is impossible the judge may order the obligor to pay compensation for non-performance".

Stellenbosch University https://scholar.sun.ac.za

performing or providing a substitute. This concept originates from the Shari'ah rule that "God imposes upon no person more than that person can do".[222]

The concept of "possibility of performance" is difficult to delineate. When does performance become impossible? In some instances (such as *force majeure*) impossibility of performance is easy to discern, but in other instances, it is not as clear. For example, if time is a factor for performance and such time has passed, would such performance be considered impossible? In such instances, the UAE Civil Code Ministry of Justice Commentary asserts that for as long as the circumstances permit, specific performance may be tendered. If however circumstances no longer permit due to the passing of time, then the obligation will be regarded as impossible.[223]

Determining "possibility" of performance is not straightforward. As there is uncertainty surrounding what "possible" performance actually is and such determination is subject to the (somewhat) subjective opinion of the court, an aggrieved party has no guarantee that a court will decide that the performance in question is, "possible". The aggrieved party is therefore subject to what the court may deem "possible". This uncertainty can be seen as one of the many reasons why a party would avoid protracted litigation to compel specific performance.[224]

---

222 Whelan *UAE Civil Code and Ministry of Justice Commentary* 2:0569. This was confirmed in Union Supreme Court decision 349/Judicial Year 24 351 where it was held that: "If the performance of the obligation *in specie* is impossible by reason of an extraneous cause in which the obligor played no part, then there will be no specific performance or compensatory performance, and the obligation will be set aside on the grounds of impossibility".

223 For the purposes of avoiding such instances and for the purposes of promoting certainty, Whelan *UAE Civil Code and Ministry of Justice Commentary* 2:0558 refers to the method set out in Article 250 of the German Civil Code and advises that there is no reason why the provisions of Article 250 should not be adopted by the UAE courts in determining "possibility". Article 250 of the German Civil Code says: "The obligee may specify a reasonable period of time for the person liable in damages to undertake restoration and declare that he will reject restoration after the period of time ends. After the end of the period of time the obligee may demand damages in money, if restoration does not occur in good time; the claim to restoration is excluded." Therefore, the aggrieved party would be able to specify a specific period of time in which the defaulting party is entitled tender proper performance; failure to perform within this time period would give rise to the right for the aggrieved party to reject any specific performance tendered and to claim damages in money.

224 On impossibility, see further, JS McLennan "Specific Performance and impossibility of performance of contracts" (2001) 118 *SALJ* 245.

Stellenbosch University https://scholar.sun.ac.za

3 3 2 2 Judicial Discretion - Instances where a Court may Order an Alternative to Specific Performance Despite Specific Performance Remaining Possible

Articles 380 (2) and 385 of the Civil Code go onto provide instances in which a judge may order an alternative to specific performance despite such performance remaining possible.

3 3 2 2 1 Oppressive Performance – Article 380(2)

Article 380(2) of the Civil Code provides that in instances where specific performance is too onerous and oppressive for the obligor, then a monetary substitution, as an alternative to performance may be ordered. Article 380(2) says:

> "Provided that if specific performance would be oppressive for the obligor, the judge may, upon the application of the obligor, restrict the right of the obligee to a monetary substitute unless that would cause him serious loss."

Pursuant to this Article, substitution of specific performance with a monetary substitute is conditional on the following:

(a) Application, by the obligor, must be made under this Article 380(2);

(b) Specific performance must be oppressive for the obligor; and

(c) The aggrieved party must not face serious loss should its right to specific performance be limited to a monetary substitute.

The first condition, namely application by the obligor is fairly straightforward, the second and third conditions are however more precarious, requiring a balancing act by the court between the interests of the obligor and the obligee.

As a starting point, the court would need to consider if an order for specific performance would be oppressive for the obligor. However, a succinct definition of what would constitute "oppressive" is not clear and is subject to the interpretation of the court; the court would also need to consider that what may be oppressive for one obligor may not necessarily be oppressive for another obligor. There is therefore no uniform definition of "oppressive" and the courts would need to apply this standard on a case to case basis, taking into account the personal circumstances of each obligor.

Stellenbosch University https://scholar.sun.ac.za

In addition, the court is obliged to consider the interests of the obligee before making any award for monetary compensation in the place of an order for specific performance; it cannot only consider the interests of the obligor. This raises the equally difficult analysis of what would constitute "serious loss" for the obligee and the court would need to perform this analysis on a case by case basis.

Guidance is offered by the UAE Civil Code and Ministry of Justice Commentary which says that the obligor must not suffer "excessive hardship"[225] which is disproportionate to the loss that the obligee would suffer in instances where the obligor failed to tender specific performance. The commentary gives the following example:

> "An example of that is where an owner builds a building contrary to an agreement not to build, which very frequently happens. In such a case, the judge must strike a balance between the interests of the persons concerned, and must avoid placing excessive sacrifices upon the obligor in order to avert a light loss to the obligee."

Therefore, whilst Article 380(2) does provide criteria to assist the court when making a decision to award specific performance or a monetary alternative, the criteria are fairly vague and difficult to apply. When an obligee makes an application to court to compel specific performance, the obligee faces the risk that the obligor will bring an application in terms of Article 380(2) to counter this request; this may result in the court limiting the obligee's right to a monetary substitution.

Therefore, when making such a request, the obligee would need to consider whether a request for specific performance would be oppressive for the obligor; this information is not likely to be easily obtainable and the obligee would need to take the risk that an order for specific performance would not be oppressive for the obligor. Further, the obligee needs to bear in mind that the court is applying a fairly subjective test in establishing the balance between the obligor and obligee's rights and subjectivity does not lead to certainty.

Ultimately it is likely to be in the obligee's interests to compel specific performance through self-help remedies because by approaching the courts, the obligee runs

225 See Whelan *UAE Civil Code and Ministry of Justice Commentary* 2:0558.

Stellenbosch University https://scholar.sun.ac.za

the risk that a request for specific performance may be refused and that the obligee's remedial rights will be limited to damages.

3 3 2 2 2 Refusal by the Obligor to Perform

Article 385 provides for two scenarios. The first is in an instance where specific performance has taken place, but the obligee has still suffered loss and the second is where an obligor merely refuses to perform. In both instances, a judge may award compensation to the obligee taking into account the prejudice suffered by the obligee and the unreasonableness of the obligor. Article 385 says:

> "If specific performance has taken place, or if the obligor persists in refusing performance, the judge shall determine the amount of compensation to be paid by the obligor, having regard therein to the prejudice suffered by the obligee and the unreasonableness of the attitude of the obligor."

Whilst Article 385 provides a helpful mechanism for an obligee to recover compensation for loss suffered as a result of the refusal of the obligor to perform or in instances where specific performance has been tendered by the obligor but the obligee has still suffered loss,[226] it does not assist the obligee in compelling specific performance from the obligor; therefore, the obligee would be better off deploying self-help remedies in instances where an obligor refuses to perform.

3 3 2 3 Alternatives to Specific Performance by the Obligor

Should a defaulting obligor fail to perform, and should the obligee decide not to approach the court for an order of specific performance, the obligee is equipped with the mechanism contained in Article 381(2) of the Civil Code which provides a way for the obligee to undertake performance itself. Article 381(2) says:

> "Article 381(2): If the obligor does not perform the act, the obligee may seek the leave of the judge to perform it (himself) and he may also perform it (himself) without leave under compelling necessity, and in both cases the performance shall be the expense of the obligor (debtor)."

With this mechanism, the obligee will still need to approach the court for leave to perform the obligation itself; unless in instances of compelling necessity.[227] This would once again utilise valuable time and resources of the obligee. Further, Article

---

[226] The award of compensation in addition to an award for specific performance is not unusual in most jurisdictions.

[227] What constitutes compelling necessity is subject to the opinion of the court.

Stellenbosch University https://scholar.sun.ac.za

381(2) is of the same flavour as Article 380(2); providing for similar, if not the same relief contained in Article 380(2); the obligee will be awarded a monetary substitute in the place of an order for specific performance. However, in this instance, a monetary substitute may not be adequate and, the "expense" of carrying out the performance may be wider than monetary substitution (for example the obligee may incur additional expense in instructing a third to do the work).

Another drawback of Article 381(2) is that the obligee is not actually obtaining the performance that it is seeking: the obligee would need to be inclined to perform the obligation itself (finding itself back at square one) or, find a third party to perform. Article 381(2), may prove helpful to assist an obligee who is seeking compensation as opposed to specific performance in instances where an obligor fails to perform, but it provides no assistance to an obligee who is looking to enforce its right to specific performance.

3 4 Comparison

Under both UAE and South African law, specific performance is recognised as an important remedy for breach of contract. Under UAE law, specific performance is regarded as a primary remedy for breach of contract and, damages, in lieu of specific performance are only awarded in prescribed instances. This is in contrast to South African law, where a hybrid approach is followed - specific performance is recognised as a primary remedy, subject to judicial discretion, but an aggrieved party has, in the first instance, the right to exercise an election between specific performance and a claim for damages.[228]

[228] A distinction must be drawn between "damages" as payment for loss actually suffered and "damages" as a true surrogate for performance. More often than not damages are awarded in conjunction with specific performance as an order for specific performance usually comes after the due date when the tendered performance was due under the contract. Van Huyssteen et al *Contract: General Principles* 368. See also Ramsden *Mckenzie's Law of Building and Engineering Contracts and Arbitration* 87. This is in contrast to UAE law: in instances where performance is not possible (Article 386 of the Civil Code) or where the obligor is refusing to perform (Article 385 of the Civil Code), the obligee will be entitled to damages; compensation for loss suffered. This is compounded by the wording of Article 385 which (not unusually) allows for compensation to be awarded in conjunction with specific performance; bringing the position of the aggrieved party closer to the position that the aggrieved party would have been in had the contract been properly fulfilled. Therefore, it appears that the court will only have the power to order true damages under Article 385 and Article 386 in instances where there has already been specific performance or in instances where the defaulting party is refusing to perform. In instances arising under Article 380(2), the recompense awarded to the obligee under Article 380(2) is restricted to a "monetary substitute" (in comparison to Article 385 and 386 where the

Stellenbosch University https://scholar.sun.ac.za

Despite the legal systems adopting different approaches to an award for specific performance, parallels can be drawn between these systems. For example, in instances of impossibility, a court under both UAE law and South African law may depart from an award of specific performance. This permitted departure gives rise to the same challenges under both systems and, both systems are tasked with defining what would constitute impossibility,[229] balancing the rights of the aggrieved party and the defaulting party. Such uncertainty would most certainly be a motivator under both systems for an aggrieved party to compel specific performance through self-help remedies.

The Civil Code sets out defined and legislated circumstances in which a court may depart from specific performance as a primary remedy. This is in contrast to South African law where, in instances where an aggrieved party has chosen to demand performance as opposed to sue for damages, the courts are afforded a judicial discretion "not confined to specific types of cases, nor…circumscribed by rigid rules."[230] This discretion is however not unfettered, but subject to equity and policy considerations.

As confirmed in case law, such equitable and policy considerations are not refined to a *numerus clausus* nor do they constitute obligatory grounds on which specific performance is to be refused. They serve merely as factors, which can to be taken into account by a court when exercising its discretion. Similarities can be drawn between these considerations and the legislated departure grounds under UAE law.

For example, in instances where specific performance may operate unduly harshly on the defaulting party, an order for specific performance may be departed from. Under South African law, the court may on its own volition, elect to take such a

awardable recompense to the obligee is "compensation"). This implies that under Article 380(2), the rights of the aggrieved party are restricted to a "monetary substitute" and not to damages as payment for loss actually suffered. This may be merely due to a difference in translation as the Arabic for monetary substitute is "بديل نقدي" and "تَعْويض" for compensation. Anonymous "Arabic Translation" *Britannica English* http://arabic.britannicaenglish.com/en/ (accessed 09-01-2018).

229 Note above discussion at n162 – 164.

230 *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A) 371.

Stellenbosch University https://scholar.sun.ac.za

consideration into account. However, under UAE law, the defaulting party would need to apply to the court in terms of Article 380(2).

Article 380(2) however provides more clarity and guidance for parties setting out two conditions, which must be met before an order for specific performance, may be departed from. These conditions involve a balancing act by the court and, whilst still not completely satisfactory as these conditions ultimately require the consideration of subjective factors, a yardstick for “undue hardship” has been identified and parties are provided with some guidance regarding the grounds on which the judicial determination will be made.

Another parallel can be drawn in instances where an order for specific performance will amount to an order for performance of a personal nature. Where personal intervention is required for specific performance it is extremely difficult, if not impossible, for a court to enforce personal performance by a defaulting party.

Under South African law, despite a recent judgment[231] that an order for specific performance under contracts of this type should not be distinguished from an order for specific performance under any other type of contract, it is likely that the nature of such contracts will still be taken into account by the courts when exercising judicial discretion.

Under UAE law, Professor Al Sanhuri[232] asserts that if the execution of specific performance involves personal involvement by the obligor, then such performance should be regarded as impossible[233] and that specific performance should only be ordered in circumstances where no personal intervention from the obligor is necessary:[234]

231 *Nationwide Airlines (Pty) Ltd v Roediger* 2008 (1) SA 293 (W).

232 See Grose *Construction Law in the United Arab Emirates and the Gulf* 202.

233 This suggestion places more emphasis on this ground than under South African law where the personal intervention of the obligor is to be merely be considered as one of the factors when a court exercises discretion on whether to make an order for specific performance or not.

234 Grose *Construction Law in the United Arab Emirates and the Gulf* 202. Limited protection is then provided to the aggrieved party by Article 381 (1) of the Civil Code which states that “if the subject matter of the right is an act which, by its nature or by virtue of a contractual provision, the obligor must perform personally, the obligee may reject performance thereof by another person.” However, this only protects the aggrieved party in instances where performance is so personal that it is required that the obligor himself performs but instead a third tenders

Stellenbosch University https://scholar.sun.ac.za

> "Specific performance is regarded as impossible if executing the same requires the personal involvement of the obligor who is not willing to interfere. However, in respect of obligations such as transferring a right in rem or any obligations relating to something in which a judge's order may be enforced by way of direct performance of the obligation such as in case of a promise to sell, specific performance is possible by operation of law or by the court judgment."

This suggestion places more emphasis on this circumstance than under South African law where the personal intervention of the defaulting party is merely a factor taken into account by the court. Nonetheless, it is close to impossible for a court to compel an individual to personally perform and under both legal systems, an aggrieved party would arguably be better placed to compel specific performance through self-help remedies.

Parallels can be drawn between the two systems and it is indicative that whilst specific performance is most certainly recognised as a principal remedy in both systems, a certain degree of latitude does exist through legislated grounds or judicial discretion. An aggrieved party is not guaranteed an award of specific performance and this will serve as a motivator for an aggrieved party to deploy its own self-help remedies to encourage specific performance by a defaulting party.

Whatever the means (either through the courts or through its own self-help mechanisms), it remains to the advantage of the aggrieved party to seek specific performance from the defaulting party. Primary reasons for this include (amongst other things) cost, time and efficiency. This makes specific performance a key remedy for any aggrieved party in a construction contract. If an aggrieved party is unable to compel specific performance (either through the courts or through its own means) from the defaulting party (and even if awarded damages), the aggrieved party will still be left with a partially completed project. This leads to many complications and hurdles.

First, the aggrieved party will need to value the works which had been performed to the date of the breach. This task is not always straightforward, and the aggrieved party may be forced to appoint an independent valuator to perform this task. The aggrieved party and the defaulting party may then face further conflict over the true

---

performance; it does not provide a means for the aggrieved party to compel personal performance by the obligor.

Stellenbosch University https://scholar.sun.ac.za

value of the partially executed works, which will in turn complicate the quantification of damages.

In instances of an aggrieved employer, the aggrieved employer will then need to enter into a new construction contract with a new contractor. However, before doing so, the aggrieved employer must have absolute certainty over its relationship with the defaulting party. Should the appointment of a new contractor be made prematurely (before, for example, termination of the defaulting party's employment under the construction contract), the aggrieved employer may be accused of repudiating the construction contract with the defaulting party as the act of appointing a new contractor to perform the same scope of works indicates an intention to no longer be bound by the construction contract. The defaulting party will then be able to accept the repudiation, cancel the construction contract and claim damages. Therefore, the aggrieved employer may have to wait a long period of time before it can proceed to lawfully appoint a new contractor - this means even more of delay in completing the already delayed works.

Further, the selection and appointment process of a substitute contractor is never simple – in most instances, it is a protracted and carefully monitored procedure. In many jurisdictions, it may even be legislated that the full tender process be repeated.

To further complicate matters, a new contractor will, in all likelihood, be hesitant to take over and continue work on partially executed works. The substitute contractor may not accept this risk or may price for this risk in its contract price – it is unlikely that this will be a small sum! This will in turn complicate and escalate insurance costs. Complications may also arise in recouping any advance payments made by the aggrieved employer to the defaulting party at the commencement of the project if this advanced payment has not yet been recouped in full.

This leads onto the point of defects and who carries the responsibility for their rectification. The new contractor will be able to price for the rectification of patent defects in its contract price (which can be claimed as damages from the defaulting party), but such defects will need to be quantified; this provides further grounds for dispute. The real problem comes with the discovery of latent defects as such

Stellenbosch University https://scholar.sun.ac.za

defects may only manifest once a period of time has passed. Who would carry the risk for the potential manifestation of latent defects? Would the new contactor price for and the aggrieved party pay for possible latent defects?

On most projects and especially on complex projects, the contractor does not perform all the works itself and in all likelihood would enter into subcontracts with a myriad of subcontractors (and potentially consultants especially if the project includes a design element). This raises questions over these relationships; it is likely that the aggrieved employer would like the subcontractors and design consultants to continue with work which they have started.

However, can the aggrieved employer deal with such subcontractors directly? It is unlikely that the subcontractors will be co-operative if they have not been paid to date by the defaulting contractor. Some subcontracts contain fairly detailed assignment and novation clauses which oblige subcontractors to enter into direct contracts with the aggrieved party – others are not so straightforward. If the subcontract agreement does not contain any assignment or novation provisions, a subcontractor can refuse to continue the subcontract works or if they agree to continue with the subcontract works, the bargaining position will be unbalanced and the subcontractor will be able to close to “name its price” to complete the subcontract works.

This situation goes further – if the defaulting party is a sub-sub-contractor, the sub-contractor will not have the luxury of time to carefully select or pursue an order of specific performance through the courts as the contractor will, in all likelihood, have the right to levy liquidated damages should the sub-contractor fail to meet the agreed completion date.

Illustrative of these problems, Oleck[235] gives the example of the house boom after World War II where housing developments bourgeoned. Each “development” required a number of private building contracts; the majority of which were entered into by buyers with limited financial resources. Unsurprisingly, the number of

[235] Oleck (1952) *Fordham Law Review* 160.

Stellenbosch University https://scholar.sun.ac.za

disputes surrounding these construction contracts also mushroomed, however the courts were inclined to make an order for damages. This was very unhelpful as:

> "[t]here can be very little doubt that a veteran of World War II, in the years immediately following the war's end, had relatively little interest in the remedy of damages when, for any reason, his builder failed to complete and deliver the house the veteran needed. He needed a home, not a lawsuit."[236]

For many aggrieved parties to a construction contract, the disadvantages of appointing a new contractor far outweigh the disadvantage of compelling a disgruntled defaulting party to comply with its obligations under a construction contract through self-help remedies; in fact, it may prove far more commercially sensible, cost and time effective to do so.

3 5 Conclusion

Despite specific performance being recognised as the key remedy for breach of contract in both South Africa and the UAE, an aggrieved party is not guaranteed an award for specific performance. Under South African law, the courts are afforded a judicial discretion which gives rise to a large degree of uncertainty and, under UAE law, specific legislated instances exist which authorise departure from an award of specific performance.

Therefore, it stands to reason that, together with more certainty of the outcome, it will be far more efficient for an aggrieved party to compel the defaulting party to comply with its contractual obligations through self-help remedies.

[236] 160.

Stellenbosch University https://scholar.sun.ac.za

Chapter 4

Suspension as a Self-Help Remedy

4 1 Introduction

Suspension by a party of its performance under a contract is a temporary remedy anticipating the resumption of performance[237] once the underlying lawful cause of the suspension, usually a breach of contract by the other party, falls away. In the majority of construction projects, timeous completion in accordance with contractually stipulated dates is imperative to avoid a multiplicity of consequences. Therefore, should an innocent party lawfully suspend, the potential consequences suffered by the defaulting party may be disastrous. This compels the defaulting party to perform its side of the bargain and accordingly encourages compliance with the agreement. In a construction contract, suspension may be a key self-help remedy available to an innocent party to compel performance by a defaulting party.

Whilst suspension may prove to be an effective remedy, it entails risks for the innocent party who must ensure that it does not suspend its obligations under the contract without lawful justification. Should an innocent party erroneously suspend its performance, it may unintentionally find itself in breach of the contract. In certain jurisdictions, this will entitle the initially defaulting party to cancel the contract and claim damages.[238] An example of this would be where a contractor has suspended its performance on account of non-payment by the employer. Should it later be proven that the non-payment was justified, the contractor would have suspended without cause and may be liable for breach of contract.[239]

It is also imperative that the consequences of a suspension are addressed in the

[237] Grose *Construction Law in the United Arab Emirates and the Gulf* 175.

[238] J Bailey, M Turrini & Kariem Mariey "The Risk of Suspension under Construction Contracts" (04-01-2017) *White & Case* https://www.whitecase.com/publications/alert/risks-suspension-under-construction-contracts#accessed (accessed 07-09-2017) and for example, see the recent cases quoted - *Wesiak v D&R Constructions (Aust) Pty Ltd* [2016] NSWCA 353 and *Ipson Renovations Ltd v The Incorporated Owners of Connie Towers* [2016] HKCFI 2117.

[239] M Curtis "Adjudication" in A Bartlett et al (eds) *Emden's Construction Law by Crown Office Chambers* (2011) 24.141. Curtis elaborates on this potential risk in the context of adjudications, where, for example, an adjudicator has determined that the non-payment by the employer

Stellenbosch University https://scholar.sun.ac.za

contract. This is to ensure *inter alia*, that time does not become "at large",[240] that the innocent party is compensated correctly and adequately for loss incurred as a result of the suspension and that the contract regulates a resumption of performance in a satisfactory manner.

This chapter will consider the self-help remedy of suspension, which may be available to both a contractor and an employer, under South African law, the UAE Civil Code and under the Red Book, as means to compel specific performance by a defaulting contractant.

4 2 Suspension under South African Law

4 2 1 The *Exceptio Non Adimpleti Contractus*

Under South African law, the so-called *exceptio non adimpleti contractus* ("*exceptio*")[241] is an extra-judicial defence which allows a party to lawfully withhold its performance and in essence "suspend" the contract until the other party has performed fully or tendered proper performance.[242] By withholding its own performance, a party is accordingly able to secure counter-performance from the other party.[243] This remedy stems from the principle of "reciprocity" which applies to "reciprocal contracts", i.e. contracts characterised by obligations which are causally related to each other.[244]

was not justified and a contractor suspends in accordance with this decision, but the decision is overturned in subsequent arbitration or litigation proceedings so that the non-payment becomes justified and the suspension unjustified, raising the question whether the suspension of work was wrongful or justified by virtue of the adjudicator's binding albeit not final decision. See also Article 29(1) of the Construction Industry Payment and Adjudication Act 2012, Laws of Malaysia Act 746 (CIPAA) which specifically provides that should an employer fail to pay in accordance with an adjudicator's decision, the contractor has a legislated right to suspend.

240 K Pickavance *Construction Law and Management* (2007) 407.
defines "time at large" as follows: "The underlying principle is that if the employer himself delays completion…he loses the right to insist on completion by the agreed date. The rationale is that he should not be able to insist on timely performance where he himself is responsible for the default." Therefore, to avoid this, it is essential that in an instance where default by the employer is the cause of the suspension, a mechanism exists which entitles the contractor an extension of the time for completion.

241 Known in the French as *exception d'inexecution* – Grose *Construction Law in the United Arab Emirates and the Gulf* 175.

242 According to Nienaber "Construction Contracts" *LAWSA* 9 para 76 the defence "is essentially a dilatory one designed to compel counter performance" cf Van Huyssteen et al *Contract: General Principles* 376.

243 Van Huyssteen et al *Contract: General Principles* 374.

244 374.

Stellenbosch University https://scholar.sun.ac.za

Authoritative guidance on the core principles and application of *exceptio* are found in the leading case of *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk,*[245] where five core principles governing this defence were summarised as follows:

1. If there is no contrary intention by the parties, the principle of reciprocity applies, by operation of law, to most of the established specific contracts. In other bilateral contracts where obligations are created for both parties, it is a question of interpretation whether the obligations are so closely linked as to render the principle of reciprocity applicable;[246]

2. Should the contract contain provisions determining the sequence of performance, then these will apply;[247]

3. The *exceptio* is only available as a defence until performance is actually made (i.e. the *exceptio* is a dilatory defence of a temporary nature);[248]

4. A party's performance may be withheld until counter performance is fully made (i.e. the *exceptio* is an absolute defence). This ensures its efficacy as a self-help remedy to compel specific performance);[249]

5. The onus lies with the plaintiff to prove that it has performed its obligations when *exceptio* is raised against it.[250]

The principle of reciprocity applies where obligations are created in exchange for one another – i.e. a party will undertake to tender performance only because the other party undertakes to tender performance in return.[251] Reciprocal obligations

---

245 1979 (1) SA 391 (A).
246 418.
247 418.
248 418.
249 419.
250 419.
251 It must also be noted that the *exceptio* is subject to the *de minimis non curat lex* rule. See *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) 420, cf Nienaber "Construction Contracts" *LAWSA* 9 para 78.

Stellenbosch University https://scholar.sun.ac.za

are therefore dependent on one another with the consequence, *inter alia*, that neither party can enforce performance by the other party unless that party has already performed properly or is able to and ready to perform.[252] Therefore, due to the interrelationship between these obligations, the innocent party has a right to withhold its own performance until the other party has performed in full or tendered to do so - making the *exceptio* an absolute defence.[253] Performance may, however, only be withheld as long as performance by a plaintiff is outstanding or, if tendered, it is defective or incomplete. If proper performance is tendered, the basis of this defence will fall away.[254] The *exceptio* accordingly, is a temporary defence.

Before the *exceptio* can be relied on by a party, regard must be had to the interplay between the principle of reciprocity and the sequence of performance under the contract.[255] Under reciprocal contracts, it is a general rule that parties are required to perform *pari passu* (simultaneously) unless it is otherwise agreed or the *naturalia* of the contract determine a different sequence for performance.[256] If a party is obliged to perform first, it cannot withhold its own performance based on the suspicion that the other party may not tender timeous or proper performance, even if reasonable grounds exist to support this suspicion.[257]

As a manifestation of *locatio conductio operis*, construction contracts are recognised as “reciprocal”, “synallagmatic” or “entire contracts”.[258] *Locatio conductio operis* is also an exception to the general rule that parties are required to perform simultaneously. The contractor is required to perform first and completely. Only once the contractor has discharged his obligation to perform and has tendered proper and complete performance of the works, will it be entitled to legitimately

252 S Eiselen “Remedies for Breach” in D Hutchison & CJ Pretorious (eds) *The Law of Contract in South Africa* (2009) 321 330.

253 *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) 420.

254 Van Huyssteen et al *Contract: General Principles* 377.

255 Eiselen “Remedies for Breach” in *The Law of Contract in South Africa* 315.

256 315.

257 Van Huyssteen et al *Contract: General Principles* 375.

258 *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) 418; Finsen *Building Contract* 16. Finsen makes reference to Wessels & Roberts *The Law of Contract in South Africa* para 1612 – “a contract is said to be entire when the complete fulfilment of the promise by either party is a condition precedent to the right to call for the fulfilment of the promise by the other”; cf Ramsden *Mckenzie’s Law of Building and Engineering Contracts and Arbitration* 221.

Stellenbosch University https://scholar.sun.ac.za

claim performance (in the form of compensation) from the employer for the work performed.[259]

Finsen[260] confirms a building contract as an example of a reciprocal agreement which requires performances to be sequential rather than simultaneous in the sense that:

> "…one party performs his complete obligation before the other is required to perform his side of the bargain - the contractor builds, and when the work is complete, the employer is obliged to pay for it. ... It therefore follows that, unless the parties have agreed to vary the common law, the contractor has to perform entirely before he becomes entitled to payment by the employer."

4 2 2 The Contractor's Right to suspend

4 2 2 1 The Contractor's Right to Suspend based on the *Exceptio*

A contractor will not be entitled to payment (interim[261] or otherwise) until it has completed the work in its entirety; a contractor who claims payment before it has fully completed the works, will find his claim is countered by the *exceptio*.[262] This was confirmed in the leading case of *Thomas Construction (Pty) Ltd (in liquidation) v Grafton Furniture Manufacturers (Pty) Ltd*[263] *("Thomas Construction")* where Nienaber J approved this view with reference to *Simmons NO v Bantoesake Administrasieraad*[264] where it was held:

> "Die kontrak is die bekende *locatio conductio operis* waarby normaalweg die vergoeding verskuldig en betaalbaar raak by voltooiing van die werk as dit as een werkstuk aanbestee is. Voor voltooiing sou die kontrakteur wat vergoeding eis afgeweer kan word met die *exceptio non adimpleti contractus*."

Therefore, in the absence of legislation or a contractual right to suspension, a

---

259 *Thompson v Scholtz* 1999 (1) SA 232 (SCA) 18; Nienaber "Construction Contracts" *LAWSA* 9 para 76; Finsen *Building Contract* 17.

260 Finsen *Building Contract* 16.

261 "Interim" and "progress" are used interchangeably in this chapter.

262 Finsen says the employer may respond to a contractor's request for payment in the following way: "Regardless what I may eventually be obliged to pay you, I am not obliged to pay you one cent until you have finished your work." Finsen *Building Contract* at 17 See also DC Robertson *When Clients Do Not Pay: A Critical Analysis of the Legal Remedies Available to the South African Building and Civil Engineering Contractors and Consultants* MSc thesis University of Pretoria (2010) 20.

263 1986 (4) SA 510 (N) 516.

264 1979 (1) SA 940 (T) 946.

Stellenbosch University https://scholar.sun.ac.za

contractor will only be entitled to payment for the works once the works have been performed properly and completely.[265] As a corollary, a contractor is not entitled to rely on the *exceptio* in order to suspend performance of the works, on account of non-payment by the employer.

However, in industry (primarily because of considerations of cash flow)[266] it is unlikely to be viable for a contractor only to receive payment upon the discharge of all its obligations.[267] Therefore, it is common practice to contract out of this strenuous payment regime of the Common Law through the introduction of interim payment provisions by means of interim payment certificates.[268]

Contractual provisions of this kind have become a standard feature in almost all construction contracts and their function was succinctly explained in *Thomas Construction*:[269]

> "…payment only becomes due on completion of the work. But contractors

---

265 See also C Binnington "Contractors in Suspense about Failure to Make Payment" (19-07-17) *BCA* http://www.bca.co.za/article/article-44-contractors-in-suspense-about-failures-to-make-payment (accessed 15-08-2016).

266 It is highly unlikely and unrealistic to assume that the cash flow of any contractor will be sufficient to finance the construction of a project from start to finish without any financial compensation from the employer. This was discussed by Nienaber J in *Thomas Construction (Pty) Ltd (in liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1988 (2) SA 546 (A) 516. Furthermore, should a contractor be in the (unlikely) position that it is able to do so, it is imperative that it obtains a payment guarantee from the employer in case the employer is unable or unwilling to pay at completion.

267 See also Robertson *When Clients Do Not Pay* 21.

268 Even though the exact procedure for the issue of an interim payment certificate will invariably vary between different contracts, it is fairly common practice for the contractor to submit a valuation of the works to a specific date and, based on this the engineer or employer's agent will then prepare and issue an interim payment certificate. The contents of an interim payment certificate will also vary based on bespoke contractual requirements, but it can usually be expected that the certificate will reflect (*inter alia*) the value of the works claimed, the value of materials both on and off the site, a security adjustment (for example if retention is applicable), an advance payment deduction (if applicable), any adjustments to the contract price (for example by way of variation orders etc), penalty deductions and so forth. Once signed and issued, the amount in the interim payment certificate will, pursuant to an undertaking contained in the contract by the employer to pay certified amounts, fall due for payment within the timeframe stipulated in the contract.

269 *Thomas Construction (Pty) Ltd (in liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1986 (4) SA 510 (N) 363. The facts of the case were (briefly) as follows: The Respondent ("the employer") had entered into two building and construction contracts ("contracts") with the Appellant ("the contractor"). The contractor defaulted on the contracts and went into liquidation. Accordingly, the employer cancelled these contracts. However, prior to cancellation of the contracts, a series of interim payment certificates had been issued under the contracts and the liquidators of the contractor sought payment of these (through provisional sentence against the employer). The employer relied on a clause in the contract, which said: "until after completion of the works…no payment shall be made…under this contract", and refused, on this basis, to

Stellenbosch University https://scholar.sun.ac.za

> cannot work without working capital. Hence the expedient of progress payments, roughly commensurate with the values of work and material on hand, to enable the contractor to finance the work for which on completion he would have been paid."

Therefore, an amount certified in the payment certificate does not represent payment for a completed portion of the work – such an amount it is purely an estimate of the value of work done and materials on site to date and can be adjusted in further certificates to correct earlier errors.[270] Accordingly, any contractually agreed interim payments are merely advances and "prepayments" on the eventual contract sum.

> "If the sum certified is merely an advance on an eventual contract sum, and if it is subject to adjustment as the work progresses, it follows that the overall principle remains undisturbed that payment ultimately depends on the delivery of a finished product of work…The notion of an advance on a contract sum, while not a loan in the true sense, does presuppose a contract sum that will eventually become due on the completion of the work…"[271]

This was confirmed in the Supreme Court of Appeal case of *Martin Harris & Seuns OVS (Edms) Bpk v Qwa Qwa Regeringsdiens; Qwa Qwa Regeringsdiens v Martin Harris & Seuns OVS (Edms) Bpk*[272] where Nienaber JA held:[273]

> "The mere completion of a specific subdivision of the work does not entitle the contractor to payment therefor. Only upon completion of the work as a whole will the contractor be entitled to payment. In the meantime, the issuing of progress certificates is merely a contractual mechanism or method to place the contractor in a position to finance the continuation and completion of his work. The issuing of a progress certificate by an architect is normally (but depending on the provisions of the agreement) but not essentially a condition for the contractor to receive payment before final completion of the work as a whole. Without that he has no right to payment and any claim could be met with the

make payment. The contractor averred that the interim payment certificates provided it with a "self sufficient cause of action without need to go beyond the certificates or to rely on contract under which certificates [were] issued." The matter later went on appeal - *Thomas Construction (Pty) Ltd (in liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1988 (2) SA 546 (A).

270 See also *Thomas Construction (Pty) Ltd (in liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1986 (4) SA 510 (N) 516 "The sum certified is not regarded as compensation for a completed segment of work. The interim certificate, through the medium of which the progress payment is effected, represents only an approximate and proportional value of the work done and materials on site at a specified date…The sum certified is provisional and remains subject to adjustment and re-adjustment in subsequent certificates…to correct earlier errors and to allow for more accurate measuring." This pronouncement was confirmed on appeal in *Thomas Construction (Pty) Ltd (in liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1988 (2) SA 546 (A) 238. See also Robertson *When Clients Do Not Pay* 21.

271 *Thomas Construction (Pty) Ltd (in liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1986 (4) SA 510 (N) 365: "The sum certified is not regarded as compensation for a completed segment of work." See also Finsen *Building Contract* 165.

272 2000 (3) SA 339 SCA.

273 Ramsden *Mckenzie's Law of Building and Engineering Contracts and Arbitration* 222.

Stellenbosch University https://scholar.sun.ac.za

> defence *exceptio non adimpleti contractus*…Prescription of a claim for payment of that portion of work which does not appear in any certificate runs at the earliest from the work as a whole is completed."

In light of this, the question arises as to the purpose and strength of an interim payment certificate. Can a contractor bring a claim for payment against an employer based solely on an interim payment certificate?

Nienaber J, in *Thomas Construction* held that a payment certificate issued by an authorised agent creates:

> "a debt due and as such a distinct cause of action…The certificate is ostensibly self-sufficient, and a plaintiff does not have to travel beyond its terms in order to establish a right of action."[274]

Further, it was held that:[275]

> "Provided that it is conceived as a true payment certificate…the amount certified becomes due and enforceable at the expiry of the stipulated period. And, since it is only a progress payment, effected while the contract is in the process of being implemented, and since the certificate is in an apparently self-contained cause of action, the contractor does not have to allege or prove, as a precondition for his claim, that he has completed all outstanding work under the contract…The right which is embodied in the certificate has accrued and is due and enforceable without regard to the executory part of the contract."

A contractor can therefore, rely solely on this payment certificate as a cause of action[276] provided the contractor expresses a "willingness and an ability to complete the remainder of the works."[277]

Apart from the possibility of suing on an interim payment certificate should an

---

274 *Thomas Construction (Pty) Ltd (in liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1986 (4) SA 510 (N) 361, confirmed on appeal in *Thomas Construction (Pty) Ltd (in liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1988 (2) SA 546 (A) 237 and in *SA Builders and Contractors v Langeler* 1952 (3) SA 837 (N) at 842 F-H and *Mouton v Smith* 1977 (3) SA 1 (A) at 5 C-G.

275 *Thomas Construction (Pty) Ltd (in liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1986 (4) SA 510 (N) 362.

276 See Lubbe & Murray *Farlam & Hathway Contract Cases, Materials and Commentary* 734 and *Adams v SA Motor Industry Employers Association* 1981 (3) SA 1189 (A). See also Robertson who says: "Failing payment, the contractor may sue the employer on the strength of the certificate and the strength of the certificate alone" - Robertson *When Clients Do Not Pay* 21 and *Thomas Construction (Pty) Ltd (in liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1986 (4) SA 510 (N) 515 where it was held that: "The building contract, in particular, does not form part of the plaintiff's cause of action..."

277 Nienaber "Construction Contracts" *LAWSA* 9 para 364 "It is therefore fair to say that payment in an interim certificate is counter-balanced not only by the work that the contractor has done and on which the amount certified is broadly based, but also by his willingness and ability to

Stellenbosch University https://scholar.sun.ac.za

employer fail to timeously pay the certified amount; the question arises whether a contractor is in such a case entitled (absent any contractual rights) to suspend the works in order to exact payment.[278]

As a starting point, it cannot be alleged that an interim payment serves as payment for a completed portion of the works.[279] The answer to the question is largely dependent on the legal nature of an arrangement for interim payment certificates and particularly the fact that interim payments are regarded as "advance payments on the eventual contract sum".

As discussed above, proper and complete performance of the works (as a whole) is reciprocal to payment of the (full) contract sum. As an interim payment is merely an advance on the final sum, the requirements for the exercise of *exceptio* are arguably not met in the postulated case.

Firstly, it would seem that the interposition of an interim certificate does not disturb the sequence of performance under the contract. Performance under the contract by the employer (namely its obligation to pay the full contract sum), will only become due (and payable) once the contractor has discharged its reciprocal obligation – namely delivery of the works in a proper and complete form.[280]

Secondly, the employer's obligation under the certificate to make an interim payment is in any event arguably not reciprocal to the completion of the whole of the works by the contractor; the reciprocity of obligations lies in entire performance of the works and payment of the contract price in full. The contractor's undertaking

complete the remainder of the works…Such willingness and ability may not be a formal precondition for payment which has to be alleged and proved by the contractor as part of his cause of action founded on an interim certificate…"

278 Under UK Law, such a right does not exist and Curtis "Payment" in *Emden's Construction Law by Crown Office Chambers* 145 says: "At common law, where the employer fails to make payment in full and on time, the contractor has no right to suspend work. The contractor may either proceed with the work or, where appropriate, terminate the contract. The immediate course of suspending work until payment is made is only available (1) where there is express provision in the contract to that effect, or (2) where the unpaid party is entitled to rely on the statutory right of suspension introduced by HGCRA." This was confirmed in *Lubenham Fidelities & Investment Co Ltd v South Pembrokeshire District Council & Anor* (1986) 33 BLR 39; *Channel Tunnel v Balfour Beatty* (1992) QB 656.

279 See n270 above.

280 Cf *Valasek v Consolidated Frame Cotton Corporation Ltd* 1983 (1) SA 694 (N) 698.

Stellenbosch University https://scholar.sun.ac.za

to complete the works was not given in exchange for the employer's undertaking to pay the amount specified in an interim certificate.

It therefore cannot be said that the contractor's right to be paid under an interim payment certificate is reciprocal to its obligation to tender complete and proper performance of the works. The requirements for *exceptio* are accordingly not satisfied and, a contractor does not have the remedial right (in the absence of contractual or legislated provisions) to suspend its obligation to perform the remainder of the works premised on non-payment of an interim payment certificate by the employer.

Should a contractor suspend progress of the works premised on the non-payment of an interim payment certificate, it is likely that the employer might allege that the contractor has repudiated the contract,[281] and may proceed to cancel the contract and claim damages from the contractor. Subject to the development discussed under the following section, a contractor is therefore well advised to rely instead on other remedies (such as instituting a claim in the courts)[282] in instances where an employer fails to pay an interim payment certificate.

4 2 2 2 The Contractor's Right to Suspend based on the Construction Industry Development Regulations

The newly proposed amendments to the Construction Industry Development Board Regulations[283] ("CIDB Regulations") create a statutory right for the lawful suspension of the performance of works by the contractor should the employer fail

---

281 It is common for construction contracts to require the Contractor to execute the works with due diligence – by suspending the performance of the works without justification, it is arguable that the contractor is also in breach of this particular contractual duty.

282 As an interim payment certificate is regarded as a liquid document, a court order can be obtained by way of a provisional sentence summons based on the strength of the certificate alone. Finsen *Building Contract* 171.

283 Department of Public Works, Amendment of Regulations Issued in Terms of the Construction Industry Development Board Act, 2000 (Act No. 38 of 2000) – published in Government Gazette number 38822, Notice 482 of 29 May 2015. For similar measures elsewhere, see: United Kingdom: Local Democratic Economic Development and Construction Act 2009 (LDEDCA), which, at Part 8, amends the Housing Grants Construction and Regeneration Act at Section 112 (the CIDB Regulations are very closely worded on the unamended version of Section 112 of the Housing Grants Construction and Regeneration Act), Malaysia: CIPAA at Section 29, Australia: Building and Construction Industry (Security of Payments) Act 2009 at Division 4.3, Section 29 and New Zealand: Construction Contracts Act 2002 at Section 24(A).

Stellenbosch University https://scholar.sun.ac.za

to make a timeous progress payment.[284]

Article 26F says:

> "(1) Where payment due under a contract is not paid in full by the date for payment and no effective notice to withhold payment has been given, the person to whom the payment is due has the right without prejudice to any other right or remedy) to suspend performance of his or her obligations under that contract.
>
> (2) The right to suspend performance may not be exercised without first giving the party in default at least seven days' notice of intention to suspend performance, stating the ground or grounds on which it is intended to suspend performance.
>
> (3) The right to suspend performance ceases when the party in default makes payment in full of the amount referred to in the notice in terms of sub regulation (2).
>
> (4) Any period during which performance is suspended in pursuance of the right conferred by this regulation is disregarded in computing any contractual time limit, or the time taken, by the party exercising the right or by a third party, to complete any work directly or indirectly affected by the exercise of the right."

Sub-Regulation 26F(1) amends the position under the Common Law and effectively creates a statutory right for suspension by a contractor provided that:

1. Payment due under a contract is not paid in full by the date for payment and;
2. No effective notice to withhold payment[285] has been given by the employer.

A contractor will therefore be entitled to a statutory right to suspend the progress of

---

[284] Known colloquially as "Prompt Payment" regulations.

[285] See Article 26E regarding a "Notice of intention to withhold payment" which says the following:
"(1) A party to a contract may not withhold payment or part of that payment, unless he or she has given an effective notice of intention to withhold that payment, or part of that payment.
(2) A party to contract may not withhold payment in terms of that contract unless there is a reasonable ground in terms of the contract on which that withholding of payment is justified.
(3) The notice referred to in subregulation (1) is considered to be a notice of intention to withhold payment if it complies with the provisions of this Regulation.
(4) To be effective, such a notice must
(a) specify the amount proposed to be withheld and the ground for withholding payment; or
(b) if there is more than one ground, specify each ground and the amount attributable to that ground;

Stellenbosch University https://scholar.sun.ac.za

the works founded on failure by an employer to pay an interim payment.

Sub-Regulation 26F(2) provides the procedure, imperative to be followed before a contractor may lawfully suspend the works and requires that the contractor gives seven days' notice to the party in default of its intention to suspend the performance. This Article also stipulates that the notice is to include the ground(s) upon which the suspension is based. Failure to comply with Sub-Regulation 26F(2) will arguably result in any suspension being regarded as unjustified - constituting a breach by the contractor. Furthermore should the cause of the suspension fall away, the right to suspend will fall away (Sub-Regulation 26F(3)) obliging the contractor to resume performance of the works[286] in order to avoid breaching the contract.

Sub-Regulation 26F(4) looks to deal with the consequences stemming from the suspension and appears to provide that such suspension will place a moratorium on the running of the time for completion by stipulating that "any period during which performance is suspended in pursuance of the right is [to be] disregarded [when] computing any contractual time limit." This is an attempt to simulate an extension

(c) be given in accordance with Regulation 261; and
(d) be given within five days from the date of receipt of the invoice or tax invoice.

(5) If the contractor, service provider or supplier is not satisfied with the reasons provided by the client or employer for withholding payment, or where the contractor, service provider or supplier is of the opinion that the client or employer has not complied with these Regulations, that contractor, service provider or supplier must declare a dispute in terms of the contract and must refer that dispute for adjudication.

(6) Where a dispute is referred to an adjudicator, a client or employer may not withhold payment
(a) where a dispute relates to a technical or legal matter, for the part of the works, deliverables or goods that is not in dispute, even though the works, deliverables or goods form part of a unit within a works schedule;
(b) where the dispute relates to the invoice or tax invoice, for the part of the invoice that is not in dispute.

(7) Where an adjudicator decides that an amount must be paid in part or in full, that amount must be so paid within ten days of the decision of the adjudicator.

[286] Depending on the nature and length of the suspension, a contractor may have demobilised, removed resources etc and accordingly may not be able to resume work immediately should the cause of the suspension fall away. In all likelihood a contractor will require time to remobilise. It is questionable therefore whether a contractor will immediately fall into default as the cause of suspension falls away – a contractor should be entitled to a reasonable time to remobilise and restart the execution of the works. See in contrast the CIPAA, which makes provision for the resumption of works. Article 29(4) of the CIPAA says: "[The contractor] shall resume performance or the rate of progress of performance of the construction work or construction consultancy services under a construction contract in accordance with the contract within ten working days after having been paid the adjudicated amount or an amount as may be determined by arbitration or the court pursuant to subsection 37(1)."

Stellenbosch University https://scholar.sun.ac.za

of time entitlement and the benefits ensuing from such an extension of time.

This Sub-Regulation will absolve a contractor from the imposition of any contractual penalties but is inadequate to effectively deal with the remaining consequences of a suspension. For example, there is no mention of the entitlement to the costs of the suspension; presumably such costs will be for the employer as its non-payment is the cause of the suspension, but the Regulations do not clearly provide for this. It is also not clear how will such costs be computed, whether the contractor will be entitled to profit and whether the potential costs for demobilisation and re-mobilisation are to be taken into account.[287]

The introduction of “prompt payment” regulations would most certainly be a positive and progressive step in the industry, providing much needed support and protection to smaller contractors, suppliers and service providers. Whilst the Regulations could benefit from more detail, especially regarding the inevitable consequences of suspension, their introduction would be a welcome improvement of the current position.

4 2 3 The Employer’s Right to Suspend Payment to the Contractor

4 2 3 1 The Employer’s Right to Suspend Payment based on the *Exceptio*

As indicated above, the employer’s obligation to pay for the works, is reciprocal to the contractor’s obligation to tender complete and properly executed works. The sequence of performance under the contract of *locatio conductio operis* requires that the contractor first tenders complete and proper performance before the employer is obliged to perform. Therefore, should the contractor fail to perform at all or tender what amounts to a malperformance (for example by delivering works

[287] See for example Article 29(4) of the CIPAA which makes some provision for the consequences of such suspension. Article 29(4) says: “The party who exercises his right under subsection (3)
- Is not in breach of contract;
- Is entitled to a fair and reasonable extension of time to complete his obligations under the contract;
- Is entitled to recover any loss and expenses incurred as a result of the suspension or reduction in the rate of progress of performance from the other party…”

See also LDEDCA – the LDEDCA has amended Section 112 of the HGCRA providing a contractor with an entitlement to costs for the period of suspension. See Section 112(3A).

Stellenbosch University https://scholar.sun.ac.za

not in accordance with contract specifications),[288] the employer is afforded the right to withhold or suspend performance of its obligations (namely the obligation to pay), by relying on the *exceptio* until such time as full performance is made. The absolute nature of the *exceptio* serves as the basis of the right to suspend which in turn, serves to compel specific performance by a malperforming contractor who is before the court as a plaintiff.[289]

In view of the fact that the *exceptio* is a temporary defence, an employer who decides to withhold payment must (provided it is possible), afford the contractor an opportunity to remedy or complete the defective or incomplete performance.[290]

An employer's right to suspend based on *exceptio* is far reaching, with a negative and often unfair impact on a defaulting contractor. In the typical case, the defective work will by *accessio,* adhere to the immovable property of the employer, thus resulting in the latter being enriched at the expense of the contractor. The position becomes even more problematic where the employer, although rightfully refusing to make payment, is nevertheless using the defective or partially completed works.[291]

In such instances, considerations of fairness require that the contractor who has tendered incomplete or defective performance needs to be protected against the harsh operation of the principle of reciprocity. The notion that the absolute nature of *exceptio* (which precludes a contractual claim for counter performance by the malperforming contractor) is in need of relaxation has elicited much controversy

288 Nienaber "Construction Contracts" *LAWSA* 9 para 77.

289 Van Huyssteen et al *Contract: General Principles* 376 say that the employer's right to withhold payment under a *locatio conductio operis* fulfils the same function as the right to withhold retention money.

290 It is imperative that the contractor is afforded this right because if the *locatio conductio operis* is upheld and the defective performance is rectified by the employer at the cost of the contractor (without providing the contractor with an opportunity to rectify the defective performance), the employer may find itself in breach of contract because it prevented contractor from discharging its contractual obligations. See Van Huyssteen et al *Contract: General Principles* 377.

291 Finsen says "defects frequently occur in buildings, which may be unsightly, but which do not really affect the utility of the building, and the cost of rectifying them may be out of proportion to the small benefit to be gained from their correction. Architects and quantity surveyors dealing with such situations have long been accustomed to negotiating an acceptable price reduction to compensate an owner who has little choice but to accept such defects." Finsen *Building Contract* 14.

Stellenbosch University https://scholar.sun.ac.za

and debate as to how this is to be achieved.[292]

4 2 3 1 1 Relaxation of the Reciprocity Principle and the Contractor's Right to Claim a Reduced Contract Sum

In a trilogy of cases namely *Hauman v Nortje,*[293] *Breslin v Hichens*[294] and *Van Rensburg v Straughan*[295] Innes JA, De Villiers CJ and Maasdorp JA attempted to address the inequitable operation of the principle of reciprocity.

All the judgments in the trilogy accepted that a malperforming contractor was disallowed from bringing a contractual claim due to the absolute nature of the *exceptio* but that equitable considerations favoured a relaxation of the principle of reciprocity so as to permit a claim for compensation notwithstanding an incomplete performance by a contractor in appropriate circumstances.[296] Because of the complexity of the judgments, a reliance in them on a passage by Voet 19.2.40, came to be taken to mean that the trilogy held that, although a contractual claim was barred by the *exceptio*, a malperforming contractor was not without recourse and would be entitled to an enrichment claim for a so-called *quantum meruit*.[297]

This understanding of the trilogy attracted severe criticism in academic and even judicial circles,[298] and resulted in the so-called doctrine of substantial performance being put forward as a doctrinally acceptable solution.[299] This was to the effect that an employer would only be entitled to withhold payment if it was entitled to and did

292 Lubbe & Murray *Farlam and Hathaway: Contract: Cases, Materials and Commentary* 570.

293 1914 AD 293.

294 1914 AD 312.

295 1914 AD 317.

296 *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) 420-421.

297 Lubbe, Murray, *Farlam & Hathway Contract Cases, Materials and Commentary* 570. See also Nienaber "Construction Contracts" *LAWSA* 9 para 79 where it was said: "In earlier times it was thought, no doubt because it was it was prompted by equitable considerations to be an enrichment claim".

298 See *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) 415 for an overview.

299 See the discussion in *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) 428-431 where reference was made to JC de Wet "Die Sogenaamde *Exceptio non Adimpleti Contractus* in die Praktyk van Vandag" (1945) *THRHR* 239 239; JC de Wet & AH van Wyk *Die Suid-Afrikaanse Kontraktreg en Handelsreg* 4th ed (1978) 180 - 181; W de Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* 3rd ed (1987) 278-279*;* HJ Chanock "The Doctrine of Substantial Performance" (1935) *SA Law Times* 162 162.

Stellenbosch University https://scholar.sun.ac.za

actually reject the contractor's defective performance.[300] However, an employer's entitlement to reject performance tendered by the contractor only existed if the performance tendered by the contractor was wholly inadequate and "if the breach is such that the contract cannot be said to have been performed substantially".[301] Therefore, if substantial performance had taken place, the employer could not rely on the *exceptio* to withhold performance but instead would be entitled to bring a counterclaim for damages resultant from breach of contract - which claim would be set off against the contractor's claim for payment.[302]

In a progressive and ground-breaking judgment in *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk*,[303] Jansen JA rejected the view that the judgments in the trilogy advocated a common solution and pointed out that the circumstances addressed in these cases were in fact dissimilar in nature.[304]

Based on his re-evaluation of the trilogy, Jansen JA insisted on a distinction being made between instances where a contract is cancelled on account of a breach by a contractor and those in which it is maintained. Enrichment liability, it was held, is only appropriate in instances where the contract is cancelled.[305]

The approach in instances where a valid contract still exists despite the breach of the contractor were dealt with in the judgments of Innes JA and De Villiers CJ in the trilogy.[306] Both of them favoured a relaxation of the principle of reciprocity so as to allow the contractor to bring a contractual claim, albeit for a reduced amount to accommodate the costs required to remedy the defective performance.[307] This

---

300 Van Huyssteen et al *Contract: General Principles* 377.

301 Lubbe & Murray *Farlam and Hathaway: Contract: Cases, Materials and Commentary* 571.

302 Van Huyssteen et al *Contract: General Principles* 377. See also *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) 427 where Jansen JA referred to Chesire & Fifoot Law of Contract, 9th edition at 561 where it was stated: "The present rule is that 'so long as there is substantial performance, the contractor is entitled to the stipulated price, subject only to cross-action or counter-claim for the omissions or defects in execution.'"

303 1979 (1) SA 391 (A).

304 *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391. (A) 421; Lubbe & Murray, *Farlam & Hathway Contract Cases, Materials and Commentary* 570.

305 *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) 424, 436. This was held to be the view held Maasdorp JA in *Van Rensburg v Straughan* 1914 AD 317; cf Lubbe & Murray, *Farlam & Hathway Contract Cases, Materials and Commentary* 570.

306 See *Hauman v Nortje* 1914 AD 293 296 and *Breslin v Hichens* 1914 AD 312 314 (De Villiers CJ) and *Hauman v Nortje* 1914 AD 293 304-305 (Innes JA).

307 *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) 422.

Stellenbosch University https://scholar.sun.ac.za

meant, according to Jansen JA, that it would be more appropriate to describe the claim by the contractor for payment as a claim for a "reduced contract price" and not a claim for "*quantum meruit*" and to avoid "the language of liability for unjust enrichment in respect of such a claim."[308]

After a review of the differences between the approach of these judges, Jansen JA ultimately accepted the approach of Innes JA as affording a more supple approach best suited to give effect to the equitable considerations underlying the relaxation of the principle of reciprocity in these cases.[309] The preferred view is that a judicial discretion to either relax or maintain the principle of reciprocity is activated[310] as soon as there is utilization by the employer of the defective performance.[311] Provided that circumstances are established which make it fair that the court exercises its discretion in favour of the contractor,[312] and the court does so, a

[308] *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) 423; Ramsden *Mckenzie's Law of Building and Engineering Contracts and Arbitration* 224.

[309] *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) 427. According to De Villiers CJ, a claim for a reduced contract price was invariably, without any judicial discretion in the matter, available where the defective performance by the contractor was being utilised by the employer to its advantage, and where the contractor genuinely believed it had performed its obligations and had accordingly instituted its action in good faith, (*BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) 421).

[310] See *Hauman v Nortje* 1914 AD 293 304 on Innes JA's discretionary approach and the discussion thereof in *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) 421-422, 426 and 434-435.

[311] It must therefore be established that the employer is utilising the defective or incomplete performance to its own advantage. Retention of the performance or enrichment through *accessio* (for example if the employer cannot help taking the benefit) would not be sufficient to prove utilisation of the performance and see also *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) 422; Ramsden *Mckenzie's Law of Building and Engineering Contracts and Arbitration* 225; Van Huyssteen et al *Contract: General Principles* 379. The possibility of allowing a discretionary approach in cases where the agreement is not cancelled, and the employer does utilise the defective performance, was left open in *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) at 436.

[312] The seriousness or otherwise of the incomplete or defective performance and a *bona fide* belief by the contractor at the time of handing over the works that it has tendered complete work (Ramsden *Mckenzie's Law of Building and Engineering Contracts and Arbitration* 225), while relevant to the exercise of the discretion are not decisive of the matter. All relevant circumstances, such as a willingness to remedy the defective work (Van Huyssteen et al *Contract: General Principles* 379; *Kam v Udwin* 1940 WLD 137) and conceivably also considerations relevant to the exercise of a judicial discretion regarding an award for specific performance, are also applicable to the exercise of judicial discretion in the context of a reduced contract price. The courts tend to exercise the equitable discretion in favour of the contractor provided the employer will not be in a worse off position than if the contract had been completed and completed properly. Ramsden *Mckenzie's Law of Building and Engineering Contracts and Arbitration* 225.

Stellenbosch University https://scholar.sun.ac.za

contractor is entitled to a claim for a reduced contract price.[313] However, should a court exercise its discretion against the contractor, the defence of *exceptio* would stand and a contractor would have to cure its defective performance, i.e. perform specifically, before being entitled to payment of the contract price.[314]

Although an employer has the right to suspend in instances where the contractor tenders incomplete or defective performance, this entitlement is not without qualification and is not an absolute remedy. The contractor may, in certain circumstances, have the right to claim a reduced contract price should the contract still stand. It was confirmed in *BK Tooling* that a claim for a reduced contract price has its origins in contract and not in unjustified enrichment. This is despite the fact the parties have not contractually agreed that in an instance of defective performance, the contractor is entitled to supplement its performance with money.[315] In such an instance, the employer "in effect would have received his full contractual due, partly specie, partly in money, and consequently becomes liable in return to perform his side of the bargain".[316]

Of course, where the discretion is exercised against the contractor, the reliance on the *exceptio* means that the contractor will have to perform specifically in order to obtain the contract price. A contractor may in any event not want to rely on the right to a reduced contract price and will accordingly remedy or complete any outstanding works - affecting specific performance, in order to be entitled to a claim for the full contract sum. The explicit linking of the *exceptio* to the remedy of specific

313 The reduced contract price is generally calculated by deducting from the contract price the costs required to bring the defective performance in line with the contract specifications See *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) 423 and 434-435; Ramsden *Mckenzie's Law of Building and Engineering Contracts and Arbitration* 224; Finsen *Building Contract* 14. The reduced contract price measure is inappropriate where the defective performance cannot be rectified or completed. See *Thompson v Scholtz* 1999 (1) SA 232 (SCA) on the approach in such instances. Should it not be possible to complete the works in line with the contract specifications in the construction context, it is common for a court to determine the reduced contract price by assessing the proportion of work that was completed and applying that proportion to the contract price – see Ramsden *Mckenzie's Law of Building and Engineering Contracts and Arbitration* 226.

314 Lubbe & Murray, *Farlam & Hathway Contract Cases, Materials and Commentary* 571.

315 Van Huyssteen et al *Contract: General Principles* 379.

316 *Thompson v Scholtz* 1999 (1) SA 232 (SCA) 16.

Stellenbosch University https://scholar.sun.ac.za

performance in *BK Tooling*[317] therefore makes it into an effective self-help mechanism to compel compliance with a contract by a defaulting contractor.

4 3 Suspension under UAE Law

UAE law does not directly address the right of a party to suspend its obligations. A party to a construction contract does not have an express and clear right to suspend and the Articles of the Civil Code governing *muqawala* do not contain specific provisions for the suspension of obligations in the context of a construction contract.

Should no specific contractual provision exist in the construction contract, allowing for example, a contractor to stop performing the work or, in the instance of an employer, a right to refuse to make payment, the parties are in principle obliged to comply with what they have contractually undertaken to do and the doctrine of *pacta sunt servanda* will be given due regard by a court.[318]

However, exceptions to the above principle do exist and certain provisions in the Civil Code may, subject to certain requirements, allow a contractant to refuse to perform its own obligations, should the other party fail to perform its own obligations[319] - closely resembling a right to suspend. These provisions are of general application[320] and not specifically intended to be used only in the context of construction contracts.[321]

---

317 This is also apparent from the rejection in *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) 434 of the doctrine of substantial performance as contrary to the approach of our law regarding specific performance.

318 Abu Dhabi Court of Cassation 725/2010 dated 4 November 2010.

319 D Baiter "Time to Terminate" (20-06-2009) *Construction Week Online* http://www.constructionweekonline.com/article-5589-time-to-terminate/ (accessed 28-08-2017).

320 E Teo "Highlights of the Laws of the United Arab Emirates, the People's Republic of China" (09-2011) *Al Tamimi Law Update* http://www.tamimi.com/en/magazine/law-update/section-7/august-september1/highlights-of-the-laws-of-the-united-arab-emirates-the-peoples-republic-of-china-and-the-common-law.html (accessed 12-09-2017).

321 In particular, the law does not deal with the consequences of such "suspension". It is, for example, unlikely a contractor would be entitled to an extension of time and consequent costs for the period of suspension when relying on Article 247. The contractor's remedy would therefore need to lie in a claim for damages for breach of contract. It is also unlikely, taking into account the legislated principle of good faith, that the employer would be entitled to levy liquidated damages for delays attributable to the suspension. See E Teo "Highlights of the Laws of the United Arab Emirates, the People's Republic of China" *Al Tamimi Law Update*. It is also highly unlikely that a prolonged suspension would (unlike under the FIDIC approach as discussed below) result in the creation of a valid termination ground as the Civil Code in Article 892 is very clear that a *muqawala* may only be terminated in three particular instances (completion of the works, consensual cancellation and by court order) - see A MacCuish & N

Stellenbosch University https://scholar.sun.ac.za

The relevant Articles of the Civil Code are Article 247[322] and (to a lesser extent), Article 414.[323] Article 247[324] says:

> "In contracts binding upon both parties, if the mutual obligations are due for performance, each of the parties may refuse to perform his obligation if the other contracting party does not perform that which he is obliged to do."

Article 414 of the Civil Code goes on to amplify Article 247:

> "Any person who is obliged to perform a thing may refrain from doing so long as the obligor has not discharged an obligation of his arising by reason of an obligation of the obligee and connected with it."

Article 247 empowers an innocent party to withhold and refuse to perform its own reciprocal obligations should the other party default by failing to perform what it has contractually undertaken to do.[325]

The UAE Civil Code and Ministry of Justice Commentary says:

> "Thus, each of the two contracting parties has the right to withhold performance of that which he is obliged to do until he is given that which he is entitled to, and by relying on that right or defence he is doing no more than to suspend the

Newdigate "United Arab Emirates: Suspension Under the UAE Civil Code, FIDIC, and the Roman law Maxim of Exceptio Non Adimpleti Contractus (ENAC*)" (15-12-2015) http://www.mondaq.com/x/451986/Contract+Law/This+is+the+first+of+two+articles+which+look+at+various+selfhelp+remedies+available+for+the+unpaid+contractor *Mondaq* (Accessed 12-09-2017). See also Abu Dhabi Court of Cassation 647/2008 dated 26 February 2009 where the court held: "…the contract shall not be deemed automatically cancelled in case of non-performance of the obligations arising out of it unless the parties thereto expressly agreed to that cancellation" and Abu Dhabi Court of Cassation 647 dated 28 February 2009 where the court confirmed its earlier decision by stating "The rights of the withholding party in such a case are restricted to a suspension of performance of the obligation and not a rescission of the contract. The effect of Articles 271 and 274 of the Civil Code is that a contract will not be deemed to be rescinded automatically through non-performance of the obligations arising out of it, unless the parties have expressly so agreed." See also Eltom *The Emirates Law in Practice* 29.

322 A provision almost identical to Article 247 can be found in the civil codes of Bahrain (Article 150), Kuwait (Article 219), Oman (Article 157) and Qatar (Article 191) – Grose *Construction Law in the United Arab Emirates and the Gulf* 176.

323 E Teo "Highlights of the Laws of the United Arab Emirates, the People's Republic of China" *Al Tamimi Law Update*.

324 Note that Article 247 is not a mandatory provision and parties can waive or exclude the right to suspend by agreement – See Grose *Construction Law in the United Arab Emirates and the Gulf* 177.

325 See Dubai Court of Cassation 6/2009 dated 22 March 2009 and Dubai Court of Cassation 111/2007 dated 1 October 2007 where it was held: "The effect of the provisions of Article 247 of the Civil Code is that in contracts binding on both sides, the performance of mutual obligations is interlinked in the sense of a mutual exchange, and either of the contracting parties may withhold performance of his obligation if the other contracting party has not performed his counter obligation that is connected with it."

Stellenbosch University https://scholar.sun.ac.za

operation of the contract."[326]

This refusal to perform is done with the intention of coaxing the other party into performing its obligations under the contract; the remedy under Article 247 acts as a means to compel specific performance by a defaulting party. This was confirmed by the court in Abu Dhabi Court of Cassation 725 of 2010 where the court held that:

> "Abstaining from the execution of the contract does not have a penal character, but it is preventative procedure intended to guarantee the continuity of the time contemporariness between the reciprocal obligations, which has been termed the "exceptio non adimpleti contractus", which is merely the right to distrain in the scope of mutually binding contracts."

Prior to invoking suspension under Article 247, it is essential that the innocent party is actually entitled to rely on and make use of this provision. Should a party rely on this article erroneously and in turn refuse to perform its own obligations under the construction contract, it is arguable that that party is in breach of the construction contract by failing, without any legal basis in law or otherwise, to timeously perform its obligations as undertaken. The defaulting party could then seek to terminate the contract for this breach.[327]

Because the basis for reliance on Article 247 is completely within the discretion of the court, an innocent party should not rely lightly on Article 247:

> "Under article 247 of the Civil Code, a contracting party may not refuse to perform his contractual obligation without justification. The determination of the question which of the two contracting parties has fallen short in the performance of his obligation, or the negation of such shortcoming, and the finding whether there is justification, are all matters of fact within the discretion of the trial court."[328]

A contractant wishing to rely on Article 247 should therefore endeavour to adhere to the guiding principles or "requirements" contained in Article 247 to ensure that the court exercises its discretion in its favour.

It is firstly clear that in order for Article 247 (as read with Article 414) to be applicable,

---

326 Whelan *UAE Civil Code and Ministry of Justice Commentary* 2:0269.

327 D Brand "Suspension of Works" (12-03-2009). http://www.arabianbusiness.com/suspension-of-works-79255.html (accessed 03-09-2017).

328 Abu Dhabi Court of Cassation 34/Judicial Year 1 142-JY-1 and confirmed in in Abu Dhabi Court of Cassation 1394/2009 28 February 2010. See also Grose *Construction Law in the United Arab Emirates and the Gulf* 176.

Stellenbosch University https://scholar.sun.ac.za

the obligations need to be mutual;[329] it was held in Dubai Court of Cassation 25/2007 that:

> "The essential matter in the regime of the right of withholding is that there must be a connection between the two obligations."

and in Abu Dhabi Court of Cassation 647 28 February 2009 that:

> "It is also settled law that the provisions of article 247 of the Civil Code provide that if one of the contracting parties has not performed his obligation, the other party may withhold performance of his obligation…provided that the obligation of each party is a counter obligation of the obligation of the other."

Ultimately, the decision of whether obligations are mutual or not will lie within the sole discretion of the court.[330]

In addition to the requirement that obligations are mutual, it is also imperative that, the defaulting party has failed to tender its performance at the agreed time.[331] Dubai Court of Cassation 25/2007 held:

> "It is thus open to either of the contracting parties to withhold performance of his obligation if the other contracting party has not performed his corresponding obligation connected with it at the agreed time."

Further, the Official Commentary on the Civil Code on this particular point says:[332]

> "The presumption here is that the mutual obligations are already due and should be performed by the two parties simultaneously. If the contract obligates either of the parties to perform his obligation before the other contracting party, the former should not benefit from this defense, as he is supposed to perform his part of the obligations before expecting the other party's performance."

Pausing here, it is necessary to note the sequence of performance of obligations in

---

329 Grose asserts that there is a school of thought which suggests that mutuality of obligations is not the underlying rationale for suspension, instead the intention of the parties is the reason for the inclusion of the right to suspend in all agreements and that this is reconcilable with Islamic jurisprudence whereby contractual obligations are regarded as independent. Grose *Construction Law in the United Arab Emirates and the Gulf* 176. Grose also makes reference to Dubai Court of Cassation No. 170/1998 dated 3 January 1998, Dubai Court of Cassation No. 102/2007 dated 19 June 2007, Dubai Court of Cassation 149/2007 dated 7 October 2007 and 'Remedies for Breach of Contract Under Islamic and Arab Laws', Nabil Saleh, ALQ, Vol 4, Iss. 4, p283.

330 Grose *Construction Law in the United Arab Emirates and the Gulf* 176 and Eltom *The Emirates Law in Practice* 29. See also Dubai Court of Cassation 124 of 2005 and Dubai Court of Cassation 160 of 2005.

331 See Abu Dhabi Court of Cassation 725/2010 4 November 2010 where it was held: "neither party may be obliged to perform its obligations before the other party performs what is due".

332 Eltom *The Emirates Law in Practice* 29.

Stellenbosch University https://scholar.sun.ac.za

the context of a *muqawala* contract. A contractor is only entitled to be paid once it has fully completed the works. Article 885 of the Civil Code says:

> "The employer shall be obliged to pay consideration upon delivery of the property contracted for unless there is an agreement or a custom to the contrary."[333]

In Dubai Court of Cassation 25/2007, the court gave an example regarding the timing of payment in the context of a sale and purchase agreement. The court held:

> "In a sale, the buyer begins by paying the price, and then the seller delivers the thing sold. The suspended obligation is the obligation of the seller to deliver the thing sold, and he withholds it until the price is paid and not vice versa. If the price is immediately payable, then the seller has the right to withhold the thing sold pending payment of the price in full. The effect of that is that if parties agree that payment of the balance of the price shall be at a specified date prior to delivery of the thing sold to the seller, then the latter will not have the right to rely on the right of withholding."

The sequence of performance, as determined by the Civil Code, will therefore have a fundamental bearing on whether a party will be entitled to rely on the provisions of Article 247. This is founded on the argument that as the obligation of the employer to pay the contractor, only falls due once the contractor has completed the works, a contractor does not have the right to rely on Article 247 and, to accordingly suspend its obligations.[334]

However, Article 885 includes two clear exceptions to the provision that the employer's obligation to pay the contractor only falls due on delivery of the works. The first exception relates to in instances where parties have agreed to interim payment provisions entitling the contractor to partial payments as the works progress ("unless there is an agreement…to the contrary").

The second clear exception is custom and "although the *muqawala* provisions of the applicable civil codes offer no support for recognising interim payments, evidence of custom in the construction industry should provide an alternative to

[333] For purposes of comparison, see also Bahrain Civil Code Article 599, Kuwait Civil Code Article 676, Oman Civil Code, Article 639, Qatar Civil Code, Article 697.

[334] This is a very similar position to that under South African law – the key difference being that unlike under South African law, an interim payment is not an advance on the final sum.

Stellenbosch University https://scholar.sun.ac.za

delivery as a basis for determining when payment falls due…”.[335]

In support of the argument that interim payments are customary, Grose[336] makes reference to the UAE Ministerial Decision 20/2000 at Article 88 where it is stated that in instances of Federal Government projects, “interim payments shall be made up to a maximum of ninety percent of the contract value.”[337]

As a result, these exceptions may provide for the creation of mutual[338] obligations which obligations fall due earlier than is anticipated by Article 885. As a result, should a contractor fail to deliver or progress with a portion of the works timeously or should the works be defective, the employer will, by virtue of Article 247,[339] be entitled to withhold payment for that particular portion of the works. On the converse, should the employer fail to make timeous payment of an interim payment, which has fallen due, the contractor, will be entitled to suspend performance of the works.

In addition to the core requirements, i.e. that the obligations in question must be both mutual and, that there must have been a failure by the defaulting party to tender its performance at the agreed time, it is also imperative that the party wishing

335 Grose *Construction Law in the United Arab Emirates and the Gulf* 158.

336 158.

337 Grose further substantiates this by drawing reference to Article 64 of Dubai Law No. 6/1997 and Article 54 of the “Procurement, Tenders and Auctions Guidebook issued under Abu Dhabi Law No.6 of 2008.

338 Within the sole discretion of the courts.

339 Provided that such obligations are regarded as “mutual” by the courts, which is highly likely. Article 877 of the Civil Code requires that the contractor complete the works in accordance with the conditions of the contract and should a contractor fail to do so, the employer, in certain instances, may, terminate the contract. In addition to this right, the employer may also be able to rely on the provisions of Article 247 and effectively “suspend” payment of the contract price to the contractor until the contractor has completed the works in accordance with the “agreed conditions” or rectified the defective work. Article 877 says: “The contractor must complete the work in accordance with the conditions of the contract. If it appears that he is carrying out what he has undertaken to do in a defective manner or in breach of the agreed conditions, the employer may require that the contract be terminated immediately if it is impossible to make good the work, but if it is possible to make good the work it shall be permissible for the employer to require the contractor to abide by the conditions of the contract and to repair the works within a reasonable period. If such period expires without the reparation being performed, the employer may apply to the judge for the cancellation of the contract or for leave to himself to engage another contractor to complete the works at the expense of the first contractor”.

Stellenbosch University https://scholar.sun.ac.za

to rely on Article 247 must be ready and willing to perform its "withheld" obligation.[340]

Furthermore, whilst it is not required that parties, prior to invoking reliance on Article 247, comply with particular and predetermined formalities contained in the Civil Code or in practice,[341] it is required that the party adheres to the legislated principle of good faith contained in Article 246(1) of the Civil Code[342] which is implied into all contracts. This makes it essential that the suspension "must be reciprocal and proportionate response to the default in question"[343] making the *de minimis* approach applicable; a party cannot withhold its obligations if the other party has substantially discharged its obligations, leaving only a minor portion of its obligation unperformed.[344] It is also vital, that the party looking to suspend its obligations, to avoid acting in bad faith, considers and addresses any reasons or potential justifications as to why the defaulting party has failed to perform its obligations.[345]

Therefore, it is imperative that the party who wishes to rely on Article 247 to compel specific performance by its counterpart only does so subject to sound justification, after considering all associated risks and, by adhering to the guiding principles

340 Grose *Construction Law in the United Arab Emirates and the Gulf* 176 where reference is also made to Dubai Court of Cassation No. 170/1998 dated 3 January 1998 and Dubai Court of Cassation No. 102/2007 dated 19 June 2007.

341 Grose *Construction Law in the United Arab Emirates and the Gulf* 178 and see also Abu Dhabi Court of Cassation 647/2008 26 February 2009 where it was held: "This implies that if any contracting party fails to fulfil his obligation, the other party shall be entitled to refrain from performing his obligations without warning or contract cancellation judgment…" See also Abu Dhabi Court of Cassation 647 dated 28 February 2009.

342 Article 246(1) of the Civil Code says: "The contract must be performed in accordance with its contents, and in a manner consistent with the requirements of good faith."

343 C Leggett and M Raymont "Getting paid: remedies for non-payment in the UAE construction industry" (27-04-2015) http://constructionblog.practicallaw.com/getting-paid-remedies-for-non-payment-in-the-uae-construction-industry/ *Practical Law* (accessed 03-09-2017). The authors go on to suggest that a party considering suspension should ask itself two questions: 1. "Does the employer have legitimate reasons for withholding payment" and 2. But for the breach has the employer otherwise substantially discharged its payment obligations?" See also A MacCuish & N Newdigate "United Arab Emirates: Suspension Under the UAE Civil Code, FIDIC, and the Roman law Maxim of *Exceptio Non Adimpleti Contractus* (ENAC*)" *Mondaq.*

344 E Teo "Highlights of the Laws of the United Arab Emirates, the People's Republic of China" *Al Tamimi Law Update.* According to Haydar *Ministry of Justice Commentary* 2:0269: "It is not open to him to rely on it in order to withhold performance of his obligation, if the corresponding obligation has been performed as to a large part thereof, and the part that remains unperformed is minor to the extent that it does not justify taking such a step". The same principle applies under South African law.

345 E Teo "Highlights of the Laws of the United Arab Emirates, the People's Republic of China" *Al Tamimi Law Update.*

Stellenbosch University https://scholar.sun.ac.za

contained in Article 247. However,

> "the assessment of whether the obligations are mutual and binding on both parties, and whether there is justification for a contracting party…[to withhold] performance of his corresponding obligation, is [ultimately] a matter of fact within the independent discretion of the trial court".[346]

4 4 The Red Book

The Red Book contains express provisions allowing for suspension in clear and defined instances by both the contractor and the employer and also prescribes the consequences resulting therefrom.

Suspension under the Red Book is not founded exclusively on the reciprocity of obligations under the construction contract: whilst an element of reciprocity is relevant in some instances, the right to suspend goes beyond this basis in other instances. Provision is made for and a distinction is drawn between an elective suspension of the works or a reduction of the rate of work by the contractor on prescribed grounds and an instruction by the engineer (effectively the employer) to the contractor to suspend work which in effect suspends the employer's obligations. Whereas the grounds for suspension of the contractor's own performance are restricted to a *numerus clausus* of listed instances premised on non-payment, the grounds for suspension on behalf of the employer are broader and in fact may serve purposes other than to enforce compliance by the contractor.

4 4 1 Suspension by the Contractor

Clause 16.1 of the Red Book governs suspension by the contractor. The first section of clause 16.1 defines the grounds upon which a contractor can legitimately base its suspension and provides the procedure for validly effecting such suspension. The first section says the following:

> "If the Engineer fails to certify in accordance with Sub-Clause 14.6 [Issue of Interim Payment Certificates] or the Employer fails to comply with Sub-Clause 2.4 [Employer's Financial Arrangements] or Sub-Clause 14.7 [Payment], the Contractor may, after giving not less than 21 days' notice to the Employer, suspend work (or reduce the rate of work) unless and until the Contractor has

346 Abu Dhabi Court of Cassation 492 25 June 2009. Provided that the trial court basis its decision on "sound reasons", sufficient to support its own decision, the court of cassation will not review the trial court's decision in this regard.

Stellenbosch University https://scholar.sun.ac.za

> received the Payment Certificate, reasonable evidence or payment, as the case may be and as described in the notice.
>
> If the Contractor subsequently receives such Payment Certificate, evidence or payment (as described the relevant sub-clause and in the above notice) before giving a notice of termination, the Contractor shall resume normal working as soon as is reasonably practicable."

It is clear that the three grounds[347] for suspension by a contractor are failure by the engineer to certify an interim payment certificate, failure by the employer to comply with its financial arrangements and the failure by the employer to comply with its payment obligations.

These grounds are, evidentially, premised on failure by the employer to comply with its payment related obligations under the Red Book. However, before a contractor surges ahead and suspends the works it must exercise caution and ensure that "the allegations on which [it] is basing [its] decision to reduce the rate of work or even suspend the work are absolutely correct, failing which the employer would be entitled to terminate [it]self under Sub-Clause 15.2(b) or (c)."[348]

Furthermore, before the contractor is contractually entitled to suspend the works, it is required to give the employer 21 days' notice[349] of his intention to do so and to provide information of the circumstances giving rise to the suspension.[350] This is a pre-requisite to suspension and failure by the contractor to adhere to it may enable the employer to argue that the suspension by the contractor was "unjustified" and

347 In the 2017 publication of the Red Book, there is a move in this direction and a welcome improvement is the extension of contractor suspension grounds by also making failure by the employer to comply with a binding agreement or determination under cl 3.7 or failure to comply with a decision by the DAAB under cl 20.1.4 suspension grounds (in addition to the payment grounds included in the 1999 publication). Furthermore, in order for the grounds to constitute valid suspension grounds, an additional requirement has been included namely, the employer failure must constitute a material breach of the employer's obligations. The advantages of this additional requirement are questionable, as the definition of "material breach" is often uncertain in practice, however, it also ensures that the contractor is not entitled to suspend for "trivial" employer breaches. The new clause also requires that the notice of intention to suspend must include reference to cl 16.1, thus ensuring the employer is aware that the notice is indeed a suspension notice.

348 B Barr & L Grutters *FIDIC Users' Guide* 3 ed (2006) 238.

349 See cl 1.3 of the Red Book "Communications".

350 Barr & Grutters *FIDIC Users' Guide* 239.

Stellenbosch University https://scholar.sun.ac.za

amounts to a breach of contract by the contractor.

Clause 16.1 also clearly sets out that the justification (provided the contractor has not yet given a notice of termination) for the suspension falls away when the contractor has "received the Payment Certificate, reasonable evidence or payment".[351] Should the justification for suspension fall away, the contractor is obliged to resume work; should the contractor fail to do so, it will be in breach of contract.[352]

Interestingly, this clause also provides a contractor with a right to reduce the rate of work as opposed to completely suspending the works.

The provisions regarding the consequences of suspension greatly clarify the position of the suspending contractor. The clause states as follows:

> "The Contractor's action shall not prejudice his entitlements to financing charges under Sub-Clause 14.8 [Delayed Payment] and to termination under Sub-Clause 16.2 [Termination by the Contractor]. If the Contractor suffers delay and/or incurs Cost as a result of suspending work (or reducing the rate of work) in accordance with this Sub-Clause, the Contractor shall give notice to the Engineer and shall be entitled subject to Sub-Clause 20.1 [Contractor's Claims] to:
>
> (a) An extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 8.4 [Extension of Time for Completion]; and
> (b) Payment of any such Cost plus reasonable profit, which shall be included in the Contract Price.
>
> After receiving this notice, the Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine matters."

This section of clause 16.1 expressly reserves and protects the contractor's entitlement to financing charges and to termination.[353] It also very importantly provides for a mechanism to extend the time for completion, to avoid time becoming "at large" and, the contractor falling into culpable delay, for which the employer

351 Prolonged suspension is a ground for termination under the Red Book. See cl 16.2 (a) and (f) says: "The Contractor shall be entitled to terminate the Contract if (a)the Contractor does not receive the reasonable evidence within 42 days after giving notice under cl 16.1 [Contractor Entitlement to Suspend Work] in respect of a failure to comply with cl 2.4 [Employer's Financial Arrangements]" and (f) "a prolonged suspension affects the whole of the Works as described in cl 8.11 [Prolonged Suspension]".

352 Barr & Grutters *FIDIC User's Guide* 238.

353 See discussion on prolonged termination.

Stellenbosch University https://scholar.sun.ac.za

would, in all likelihood, be entitled to levy liquidated damages.

Furthermore, this section of the clause deals with the cost implications of a suspension (including any costs for the resumption of works) and, it is important to note that the contractor is not only entitled to "Cost" as defined[354] but also to reasonable profit.[355]

The contractual right of the contractor to claim an extension of time for any delay caused by the suspension, negating any remedy an employer would have to claim liquidated damages for that particular period and, the contractual entitlement of the contractor not only to cost, but to profit as well, heightens the pressure on the employer to perform by linking the act of suspension by the contractor to remedies for (employer's) breach of contract. Any reasonable employer would, in all likelihood, be compelled into timeous performance of its own obligations, by adhering to the payment provisions and accordingly remedying its default, to avoid incurring further costs and to ensure expeditious completion of the works.

4 4 2 Suspension by the Employer

The right of the employer to suspend is of a totally different nature to that of the contractor and is not necessarily premised on a right to withhold a reciprocal obligation. Clause 8.8 provides for suspension by the employer and says:

> "The Engineer may at any time instruct the Contractor to suspend progress of part or all of the Works. During such suspension, the Contractor shall protect, store and secure such part or the Works against any deterioration, loss or damage.
>
> The Engineer may also notify the cause for the suspension. If and to the extent that the cause is notified and is the responsibility of the Contractor, the following Sub-Clauses 8.9, 8.10 and 8.11 shall not apply."

Therefore, the employer, through an instruction issued by the engineer, can merely instruct the contractor to suspend the performance of the works irrespective of the

---

354 "'Cost' means all expenditure reasonably incurred (or to be incurred) by the Contractor, whether on or off the Site, including overhead and similar charges but does not include profit."

355 Barr & Grutters *FIDIC User's Guide* 238.

Stellenbosch University https://scholar.sun.ac.za

cause of the suspension.

It is clear, from this clause, that the employer (through the engineer[356]) has broad powers regarding suspension which powers may be exercised at "any time" and which may be exercised in relation to all or a portion of the works. There are accordingly "no restrictions on the reasons[357] for or the time when an instruction to suspend can be given."[358] During such suspension, the contractor is obliged to ensure that the works are protected against "any deterioration, loss or damage" and accordingly the risk of such remains with the contractor.[359]

Ultimately, this clause only allows for the suspension of the progress of the works and, not the suspension of payments by the employer.[360] Therefore, should an employer be contractually obliged to make a payment under the contract, it will not be able to rely on the suspension of the works as justification for failing to make that

[356] "Engineer" is defined as "the person appointed by the Employer to act as the Engineer for the purposes of the Contract" and it is the Engineer who is authorised, under the Red Book, to issue instructions to the contractor – see cl 3.3 of the Red Book. Therefore, an employer should request the Engineer to issue an instruction to suspend to a contractor and should not do so itself. See E Baker, B Mellors, S Chalmers and A Lavers *FIDIC Contracts Law and Practice* (2009) 5.65.

[357] An employer could for example suspend for commercial reasons arising out of external factors (such as political reasons), however often any third party lender that is funding the project may limit an employer's right to suspend – R Saunders "FIDIC: Suspension and termination under Red, Yellow and Silver Books" http://uk.practicallaw.com/5-502-7110?q=suspension *Practical Law* (Accessed 01 08 16).

[358] However, the clause does not indicate any requisite time or notice period in which the contractor is to comply with the instruction and effect suspension of the Works. This allows for a degree of (essential) flexibility; should the instructed suspension be for safety reasons, it may be that immediate suspension is required or, should the suspension be at the convenience of the employer, a longer period before suspension takes effect may be more suitable - see Baker et al *FIDIC Contracts Law and Practice* 5.65.

[359] See cl 17.2 of the Red Book "Contractor's Care of the Works" which says (in part): "The Contractor shall take responsibility for the care of the Works and Goods from the Commencement Date until the Taking-Over Certificate is issued…for the Works, when responsibility for the care of the Works shall pass to the Employer." Further to this, the contractor under cl 18.1 will be obliged to keep the contract insurances in place. However, the clause is not clear whether the contractor is permitted to demobilise, including the removal of Contractor's Equipment which is expressly prohibited, without consent - see Sub-cl 4.17. Should this not be included in the Engineer's instruction – a prudent contractor should request further information - Baker et al *FIDIC Contracts Law and Practice* 5.69. In any event, should a contractor be required to maintain the Site or to demobilise and consequently remobilise when the suspension is lifted, it will be entitled to the associated Costs (and extensions of time connected to remobilisation) provided the cause of the suspension is not the responsibility of the contractor. Baker et al *FIDIC Contracts Law and Practice* 5.70.

[360] Baker et al *FIDIC Contracts Law and Practice* 5.71 – 5.72.

Stellenbosch University https://scholar.sun.ac.za

payment.

However, pursuant to most contracts, it is likely that progress (in comparison to solely time) and the amount due to the contractor will be linked. Suspension can therefore "have a significant impact on the contractor's cash flow by delaying payment of amounts to which, if the progress had not been suspended, he would have been entitled earlier."[361] This, together with the associated cost, risks regarding protection of the works and the threat of the imposition of liquidated damages all serve as compelling factors to encourage specific performance by the contractor.

As mentioned above, an employer can instruct suspension in two instances. The first instance (where the cause of the suspension is not the contractor's responsibility) is, for the employer, a very costly option as clause 8.9,[362] 8.10 and 8.11 provides the contractor with certain entitlements consequent of the suspension. Such clauses entitle the contractor to an extension of time for the delay, cost, reasonable profit and, (potentially) payment of the value of plants and materials which have not yet even been delivered to Site.

In instances where the cause of the suspension is attributable to the contractor,[363] the contractor will not be entitled to rely on clauses 8.9 to 8.11 and will not have the entitlements afforded by these clauses such as an extension of time to the time for completion nor any costs associated with the suspension. This will encourage the contractor (by placing pressure - financial and otherwise on the contractor) to remove or negate the cause of the suspension in order to resume the Works and to

[361] Baker et al *FIDIC Contracts Law and Practice* 5.82.
[362] This clause closely mirrors cl 16.1.
[363] Examples of "contractor caused suspension" include *inter alia*, unsafe working, breach of local laws, failure to maintain insurances and failure to submit a revised programme. See Baker et al *FIDIC Contracts Law and Practice* 5.75. Furthermore, the contractor's duty to ensure protection of the works is a further factor which would encourage specific performance by a defaulting contractor in instances where the suspension is "contractor caused" as the contractor will not have recourse against the employer in the event the works are destroyed or damaged during this period of suspension.

Stellenbosch University https://scholar.sun.ac.za

complete same timeously (avoiding the imposition of liquidated damages).[364]

It is also within the discretion of the engineer to decide whether to inform the contractor of the reasons for the suspension; there is no obligation to do so and the engineer may accordingly elect not to.[365] However, should the cause for the suspension be the responsibility of the contractor and, as the employer would (more than likely) want to avoid compensating the contractor for the suspension,[366] then in such instances it will be obliged to notify the contractor.

Suspension of the progress of the works under the Red Book invariably impacts negatively on the contractor's cash flow. This amounts to an effective mechanism in the hands of the employer to compel performance by the contractor. Furthermore, the Red Book helpfully addresses the ensuing consequences of a suspension by governing any entitlements, termination in instances of prolonged suspension and, where applicable, the resumption of work.

The Red Book is therefore clear and instructive on how a suspension is to occur, how work is to resume and most helpfully, in providing express contractual mechanisms which are well thought out and equipped to deal with the inevitable and difficult consequences of a suspension.

4 5 Conclusion

Under South African law and the law of the UAE, a right to withhold performance (and, in effect, the right of a party to suspend) is recognised as a means to compel

---

364 Conceptually it may be possible to argue that suspension by the employer is actually founded in a version of reciprocity – the employer is entitled to refrain from performing its own reciprocal obligations as the contractor has not performed its own obligations. However, the contractor has not performed its obligations because of an (authorised) action by the employer - the instruction by the employer is the underlying reason for the contractor's duly authorised suspension, which in turn, entitles the employer to suspend its own obligations under the contract.

365 A reasonable Engineer would inform the contractor of the reason and potential extent of the suspension so that the contractor is aware how to "meet his obligation to protect, store and secure that part of the Works". Barr & Grutters *FIDIC User's Guide* 176.

366 And accordingly, for clauses 8.9, 8.10 and 8.11 not to be applicable. Baker et al *FIDIC Contracts Law and Practice* 5.66. It is questionable whether in instances where the cause of the suspension is attributable to the Contactor, but such cause only affects a portion of the Works, yet the employer elects to suspend the whole Works, whether the contractor will be entitled to claim the entitlements contained at clauses 8.9 – 8.11 for the suspension of the remainder of the Works. See Baker et al *FIDIC Contracts Law and Practice* 5.73 and 5.75.

Stellenbosch University https://scholar.sun.ac.za

performance by a defaulting party. Both systems recognise the concept of reciprocity as the foundation of suspension and an aggrieved party is empowered to withhold and refuse to perform its own obligations until proper and complete performance has been tendered by the defaulting party. This is subject to the aggrieved party being ready and willing to perform its "withheld" obligation.

Under South African law, there is a presumption that recognised contract types such as a *locatio conductio operis* give rise to reciprocal obligations unless the contrary is clear from the intention of the parties. Under UAE law, the determination of the reciprocity of obligations lies within the sole discretion of the court – potentially giving rise to uncertainty.

The sequence of performance under a contract is an important consideration under both jurisdictions for determining whether a suspension is lawful: the obligor must have failed to discharge the obligation at the agreed time for performance. Under South African law, a contractor is obliged to perform in full before being entitled to payment and, as held by the courts, interim payments are merely advances on the final sum. An argument accordingly exists that a contractor will not be entitled to lawfully suspend premised on the non-payment of an interim payment. However, the proposed draft CIDB Regulations make provision for suspension based on non-payment of an interim provision.

Although the Civil Code also provides that an employer's obligation to pay a contractor only falls due on delivery of the works, this is subject to two exceptions, namely the agreement of the parties and custom. It is accepted that that arrangements for interim payments fall under the latter exception. Therefore, under the Civil Code, a contractor will be entitled to suspend its performance based on the failure by the employer to make an interim payment.

In contrast to UAE law and South African law, the Red Book does not base lawful suspension on reciprocity and the sequence of performance. The Red Book instead provides for the elective suspension of the works by the contractor on prescribed grounds (premised on non-payment) and by the employer on an instruction by the engineer to the contractor to suspend work. The employer is entitled to suspend on

Stellenbosch University https://scholar.sun.ac.za

mere instruction – there need not be an underlying reason justifying such suspension and, in fact, there is no obligation on the employer even to notify the contractor of the cause of the suspension.

This approach contains merit, as there are many instances in which it is favourable for a project to be suspended outside of the contractual grounds listed in the Red Book and outside of the requirements recognised under South African law and the Civil Code. Arguably, an entitlement to suspend based on elective instruction should be given to both the contractor and the employer; provided the contract effectively balances risk - affording suitable recourse to the aggrieved party.

Further, under the Red Book a contractor is, in addition to the right to suspend, provided with the option to “reduce the rate” of work and in certain instances the contractor may be able to rely on prolonged suspension to legitimately terminate the contract. These are contractual creations and there is no equivalent entitlement under South African or UAE law. However, both are helpful tools and similar provisions should be provided for in construction contracts in jurisdictions like South Africa and the UAE.

Further advantages of the Red Book are that the consequences of suspension are addressed: in the event of rightful suspension by a contractor, the contractor may be entitled to an extension of time and payment of costs (plus reasonable profit). This will avoid the imposition of liquidated damages and accordingly the phenomenon of time from becoming “at large”. This is one of the most important consequences, which the South African Common Law and the Civil Code fail to make provision for. The Red Book also favourably provides for instances where the obligations of the parties are resumed after suspension, the allocation of risk and, very importantly addresses liability for the costs of suspension and the according computation thereof.

Whilst suspension, as an effective remedy, is afforded due regard under South African law and the Civil Code, provisions dealing with the consequences of suspension are not clear nor readily available. It is advisable for parties to incorporate provisions addressing these omissions when concluding a construction

Stellenbosch University https://scholar.sun.ac.za

contract. The incorporation of some (or similar) suspension provisions such as provided for in the Red Book in contracts that are subject to South African law or the Civil Code will provide certainty and will most certainly be advantageous for both parties.

Suspension as a means to compel performance by a defaulting party can prove to be a very effective self-help remedy. However, as is apparent from the discussion above, the application of this self-help remedy can be extremely complex, and the innocent party must ensure that it is indeed entitled to rely on this remedy to avoid being in breach of contract itself.

Furthermore, the ensuing consequences of suspension can be highly complicated and unless provision for dealing with these circumstances are contained in the contract as is the case under the Red Book, the innocent party may find the benefits of utilising suspension as a self-help remedy are diminished.

Stellenbosch University https://scholar.sun.ac.za

Chapter 5

Liens – A Self-Help Remedy for the Contractor

5 1 Introduction

A builder's lien is a well-known remedy in the construction industry and entails a "right to retain property lawfully belonging to another pending discharge or settlement by its owner of debts or claims owed to the party in possession."[367] A lien is therefore a deviation from the standard commitment of a contractor to, upon completion of the works, vacate the site and submit possession of the works to the employer.[368]

As a manifestation of the broader phenomenon of the possessory lien, a builder's lien, also known as a "mechanic's" or "workman's" lien, is a security mechanism,[369] that can be exercised over the entire site or works or both, a portion of the site or works, materials, plant and, in some instances, even documents and drawings.[370] In some jurisdictions, a contractor may even, after an effluxion of time, be able to dispose of and sell the property, with a right to use the proceeds to discharge the secured debt.[371] In particular circumstances, therefore, it serves as an effective and powerful means for a building contractor to ensure payment.[372]

---

367 Anonymous "Contractual and Legal" *Master Builders Association* (2017) https://www.masterbuilders.co.za/index.php/contractual-and-legal (accessed 25-09-2017). See *United Building Society v Smookler's Trustees and Golombick's Trustee* 1906 TS 623, Nienaber "Construction Contracts" *LAWSA* 9 para 53; TJ Scott "Liens" in WA Joubert & JA Faris *LAWSA* 15(2) 2nd ed (2003) para 49; PC Loots *Construction Law and Related Issues* 417.

368 Nienaber "Construction Contracts" *LAWSA* 9 para 53.

369 Scott "Liens" *LAWSA* 15(2) para 50; Ramsden *Mckenzie's Law of Building and Engineering Contracts and Arbitration* 110.

370 Ramsden *Mckenzie's Law of Building and Engineering Contracts and Arbitration* 116 notes this is not the position regarding an architect's drawings. In the usual course of events, ownership of such documents will only pass on delivery. Rather than relying on a lien, an architect's right to retain documents is based on the *exceptio non adimpleti contractus*.

371 However, if there is a dispute surrounding the amount outstanding, a contractor cannot dispose of the property until such dispute is settled - Ramsden *Mckenzie's Law of Building and Engineering Contracts and Arbitration* 110. See also Article 107 of the UAE Federal Law No.18 of 1993 (Commercial Transactions Law).

372 Under South African law, note that only a debtor creditor lien serves as a performance inducing mechanism in a direct sense. An enrichment lien on the other hand serves as more of an indirect performance inducing mechanism (particularly as recovery under an enrichment lien is restricted to either lesser of either the owner's enrichment or the contractor's impoverishment (see the discussion at 5.2.6.2) below) but still may serve as a motivator to encourage an employer to perform should an employer wish to, for example, sell the property free from encumbrances - see the discussion below at 5.2.5.

Stellenbosch University https://scholar.sun.ac.za

The exercise of a lien can have a hugely detrimental effect on the progress of a project by depriving a non-paying employer of the benefits of the property and work performed. Any sensible employer would be moved to remedy its default so that the project can continue, and it can enjoy the corresponding benefits. Consequently, when exercised in the correct manner, a lien is most certainly a persuasive means to compel compliance by a defaulting employer.

However, this mechanism should be resorted to with careful consideration - the unlawful exercise of a lien is likely to have unintended negative consequences and, in industry, the exercise of a lien can also give rise to many practical problems.[373] The exercise of a lien as a means to obtain payment has often been regarded as a "high risk endeavour".[374]

5 2 South African Law

5 2 1 Background

In South African law, the possessory lien is an established and well-known institution. Under Roman law, retention (*retentio*) was recognised as type of security based on the maxim *minus est actionem habere quam rem.* The holder (*retentor*) of another party's thing could, with reliance on the *exceptio doli*, defeat the owner's resort to the *rei vindicatio* until payment of a claim against the owner.[375] This formed the basis for the further development of the Roman Dutch manifestation of the institution under the influence of Germanic notions of pledge into the sophisticated institution recognised in case law.[376]

373 For example; the contractor will need to secure the property it intends to retain and it may prove costly to effectively secure uninterrupted possession of the works or site. Whilst such costs may well be claimable as damages from the employer, the contractor will need to initially pay these costs. It may also be regarded as a criminal offence (which may involve law enforcement such as the police) to remain in possession of another's property without permission. See Grose *Construction Law in the United Arab Emirates* 195.

374 NR Brendal, AL Barrette and W El-Riachi "The Availability in the UAE of Liens to Secure Payment under Construction Contracts" (2010) 24 *Arab Law Quarterly* 309 315.

375 M Wiese "The Legal Nature of a Lien in South African Law" (2014) 17 *PER/PELJ* 2526 2527-2528.

376 See Scott "Liens" *LAWSA* 15(2) para 50 n4 where reference is made to Van der Merwe *Sakereg* 712.

Stellenbosch University https://scholar.sun.ac.za

5 2 2 Legal Nature

The legal nature of liens has attracted discussion and controversy as to whether it is properly characterised as a right, a defence to the *rei vindicatio* raised by an owner or a legally recognised power or capacity to withhold possession of a thing from the owner.[377] This theoretical debate is not relevant to the operation of liens in the construction context and will not be entered into here. For present purposes it will be accepted that the contractor, as lienholder, is entitled to retain possession of the employer's thing and defeat a vindicatory action by the latter until the related debt has been discharged.[378]

5 2 3 Two Types

South African law recognises two types of lien. Classified by reference to the origin of the debt which the lien is used to protect, a distinction is made between debtor and creditor liens and enrichment liens.[379] This distinction between the two types of liens was well summarised by Bristowe J in *United Building Society v Smookler's Trustee*[380] where it was held:

> "The rule then seems to be that salvage and improvement liens prevail against all the world, but, on the other hand, are limited to expenses which have maintained or advanced the market price; while debtor and creditor liens (so far, at all events, as they include expenses not limited by considerations of market price) are restricted within the limits of contractual privity."

A debtor and creditor lien accordingly, serves to secure payment of money

---

377 Wiese (2014) *PER/PELJ* 2529. Note also 2527, 2530 and 2537 - 2539 where reference is made to JC Sonnekus and JL Neels *Sakereg Vonnisbundel* 2ed (1994) 125 - 126 who assert that a lien is not a right but instead is a type of relationship to which certain consequences attach by virtue of law and accordingly is a passive ability to withhold. See also J Du Plessis *The South African Law of Unjustified Enrichment* (2012) 292 n160. This is in contrast to the view held by Van der Merwe and Scott that a lien is, in fact, a defence to the *rei vindicatio*. See CG Van der Merwe *Sakereg* 2 ed (1989) 712 and Scott "Liens" 15(2) para 50. Whether a possessory lien is a "remedy" in the technical sense, has also been doubted: Ramsden *Mckenzie's Law of Building and Engineering Contracts and Arbitration* 110 is of the view that a lien is "security for a debt and does not itself afford a right to execute against that security." See also Grose *Construction Law in the United Arab Emirates and the Gulf* 193.

378 Du Plessis *The South African Law of Unjustified Enrichment* 289. This chapter assumes an "organised construction context" where a subcontractor is in contract with the contractor who is, in turn, in contract with the employer as owner of the land. This is not necessarily always the case, however, e.g. where A, who is not owner, engages B to erect a building on land belonging to C.

379 Debtor and creditor liens, also referred to as liens ex contractu are only enforceable between the parties to the contract: Wiese (2014) *PER/PELJ* 2527. Note also that enrichment liens are sometimes referred to as real liens or salvage and improvement liens.

380 1906 T.S. 623 630.

Stellenbosch University https://scholar.sun.ac.za

expended by the lienholder on another's property by virtue of a contractual duty to do so.[381] The principal debt need not necessarily arise *ex contractu*, however. In the case of the so-called enrichment lien, it consists of a debt based on unjustified enrichment arising from the expenditure of money or work done on the property of another in the absence of a contract to this effect.[382]

The significance of the distinction is twofold, the two categories differing both as regards the scope and the extent of the protection afforded the lienholder.

5 2 4 The Scope of a Lien

Enrichment liens, for instance, are restricted to the recovery of *necessariae impensae*, (expenses which are necessary to preserve the property) and *utiles impensae* (expenses which even though not necessary, nevertheless improve the market value of the property). Expenses which satisfy the desires of the owner but which are not necessary and do not improve the market value of the property (*voluptuariae impensae*), are not recoverable.[383] The scope of debtor and creditor liens on the other hand, is determined by the contract between the parties and may, apart from payment for services rendered, extend even to compensation for *voluptuariae impensae*.[384]

5 2 5 Extent of the Protection: Against Whom Does a Lien Operate?

As regards the extent of the protection, it is accepted that as debtor and creditor liens "spring out of the soil of contract", and are accordingly confined to within the limits of contractual privity,[385] they are available only against the other party to the contract.[386] Although such a lien is said to afford the creditor a personal right only,[387] and does not avail against a secured creditor such as a mortgagee, the lienholder does enjoy a preference over the concurrent creditors of the insolvent

---

381 Du Plessis *The South African Law of Unjustified Enrichment* 289 n140.

382 Scott "Liens" *LAWSA* 15(2) para 50; Du Plessis *The South African Law of Unjustified Enrichment* 289.

383 *United Building Society v Smookler's Trustees and Golombick's Trustee* 1906 TS 623 627, see generally Du Plessis *The South African Law of Unjustified Enrichment* 277-279.

384 *United Building Society v Smookler's Trustees and Golombick's Trustee* 1906 TS 623 627 – 628. See also Scott "Liens" *LAWSA* 15(2) para 68.

385 *United Building Society v Smookler's Trustees and Golombick's Trustee* 1906 TS 623 at 628.

386 Scott "Liens" *LAWSA* 15(2) para 50; Nienaber "Construction Contracts" *LAWSA* 9 para 54.

387 Scott "Liens" *LAWSA* 15(2) para 50.

Stellenbosch University https://scholar.sun.ac.za

owner.[388]

An enrichment lien, on the other hand, is thought to afford the lienholder a real right of security, enforceable and effective against "against all comers".[389] As such, it can be maintained not only against the owner, but also against its successors in title, creditors of the owner seeking to attach the property, holders of mortgages over it (even mortgages established prior to the lien) and, entitles the lienholder to a preference in the insolvent estate of the owner.[390] In this sense, an enrichment lien will most certainly be a motivator for reimbursement should the employer wish to sell the property free from encumbrances.[391] An enrichment lien can therefore most certainly be viewed as an indirect self-help enforcement mechanism available to an innocent contractor.

388 See section 95(1) of the Insolvency Act 24 of 1936; Scott "Liens" *LAWSA* 15(2) para 83. This effect also helps to distinguish between a debtor and creditor lien and a reliance on the *exceptio* by a contractor. Although a debtor and creditor lien and the *exceptio* are both regarded as "passive weapons" and are based on the reciprocity between the contractor's duty to vacate the premises on completion and the employer's duty to pay the full contract price, the two phenomena are regarded as distinct institutions in South African law (see for example Wiese (2014) *PER/PELJ* 2540, 2542 n81, 2545-2546; Nienaber "Construction Contracts" *LAWSA* 9 para 53; Du Plessis *The South African Law of Unjustified Enrichment* 289 n140; cf G Pienaar and A Stevens "Rights in Security" in R Zimmermann, D Visser & K Reid (eds) *Mixed Legal Systems in Comparative Perspective: Property and Obligation in Scotland and South Africa* (2004) 758 779-780). According to Wiese, a lien comes into play where the employer sues as owner with the *rei vindicatio* against a claim for recovery under the contract where the *exceptio* may be relied upon asserting, that "a lien is a form of the *exceptio non adimpleti contractus*, but the *exceptio non adimpleti contractus* does not always give rise to a lien. It does so only when the performance withheld is the return of a thing." See M Wiese "South African perspective on a lien as real security right in Scottish law" 2017 *TSAR* 89 100-101. But note that the protection afforded by s 95(1) of the Insolvency Act will only apply in the case where a lien is relied on.

389 Nienaber "Construction Contracts" *LAWSA* 9 para 54; Scott "Liens" *LAWSA* 15(2) para 50; but see Wiese (2014) *PER/PELJ* 2527 2526-2553 for a critical discussion.

390 Scott "Liens" *LAWSA* 15(2) para 82; Ramsden *Mckenzie's Law of Building and Engineering Contracts and Arbitration* 112, by way of example, refers *Browns Asignees v Pote* 4 EDC 50; *In re SA Loan, Mortgage and Mercantile Agency v Owens and Campbell* 4 NLR 68; *United Building Society v Smookler's Trustees* 1906 TS 623 (lien against a mortgage holder), *Liquidators of Royal Hotel Co v Rutherford* 16 CTR 179 (against the liquidators of an insolvent employer company), *Levy v Tyler* 1933 CPD 377 (against a purchaser who is simultaneously a bondholder at a sale in execution), *Oldham v Kerns* 27 NLR 17 (lien maintained against a purchaser under a judicial sale), *Phillips and Gordon v Adams* 1923 EDL 104 (lien against a third party who has taken over the employer's property). See *D Glaser & Sons (Pty) Ltd v The Master and Another NO* 1979 (4) SA 780 (C) 792 for the order of priority between liens.

391 It is often a condition of sale and purchase contracts that a property is sold free from encumbrances and liens.

Stellenbosch University https://scholar.sun.ac.za

5 2 6 Requirements

5 2 6 1 Possession

The first requirement for the valid exercise of a lien is effective, actual, uninterrupted and lawfully acquired[392] possession - it logically stands that one cannot retain something which is not in one's possession.[393] In order to satisfy the possession requirement, two elements must be present, namely a subjective one relating to the intention of the lienholder (*animus possidendi*) and an objective one relating to the exercise of physical control (*detentio*) over the property.[394]

In order to meet the first element, the contractor must have the intention to hold and exercise control over the property as security.[395] There need not be an intention to hold as an owner, however, the lienholder should hold with a view to secure some benefit as against the owner – for example, to utilise the subject matter as a security for a debt.[396]

In order to meet the second element, the contractor must remain in effective physical control over the works or the site.[397] Symbolic possession is not sufficient and a contractor is required to prove that the site or the relevant portion of it is occupied and under its control at "all material times".[398] This is achievable by, for example, locking gates, barricading doors,[399] employing security guards and even

392 Ramsden *Mckenzie's Law of Building and Engineering Contracts and Arbitration* 113 – the initial acquisition of possession must have legal justification.

393 *Insolvent Estate of Israelson v Harris and Black* 22 SC 135 (1905) 141. See also Scott "Liens" *LAWSA* 15(2) para 51-53; Du Plessis *The South African Law of Unjustified Enrichment* 290-291.

394 Ramsden *Mckenzie's Law of Building and Engineering Contracts and Arbitration* 113. See also *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) and Scott "Liens" *LAWSA* 15(2) para 52.

395 See *Scholtz v Faifer* 1910 TS 243 and *Ploughall (Edms) Bpk v Rae* 1971 (1) SA 887 (T) 891.

396 See also Ramsden *Mckenzie's Law of Building and Engineering Contracts and Arbitration* 112.

397 Note that a lien can also be "exercised over part of a thing on which work has been done and which is separately in the lienholder's possession, in order to enforce an unseverable counter-performance" - Ramsden *Mckenzie's Law of Building and Engineering Contracts and Arbitration* 114.

398 Nienaber "Construction Contracts" *LAWSA* 9 para 55. See also S Bester "Construction Law – The Legal Principles underlying the Builder's Lien" (12-06-2012) *Markram* https://www.markraminc.co.za/knowledge/construction-law-the-legal-principles-underlying-the-builder-s-lien (accessed 14-09-2017). Should the contractor allow an employer limited access this will not necessarily result in possession being relinquished, provided that the intention to hold and exercise possession does not cease to exist. See also *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA).

399 Finsen *Building Contract* 67.

Stellenbosch University https://scholar.sun.ac.za

merely holding the keys to a building.[400] Possession is not be achieved by merely displaying a sign threatening the prosecution of trespassers.[401]

It is common to have more than one direct contractor to a construction project and even more likely to have a multiplicity of subcontractors. As possession is not necessarily exclusive to one person,[402] several independent contractors (and indeed subcontractors) can individually exercise a lien over a part or the whole of the works simultaneously if they are able to satisfy the requirements for the valid exercise of a lien by asserting their rights against the employer.[403] It is however debatable whether a subcontractor is able to satisfy the requirements for the valid exercise of a lien and this point is expanded on in the discussion below.

As the contractor remains in possession of the works when relying on a lien, it flows that the contractor carries the risk and, will remain responsible for loss or damage to the site or works whilst in possession[404] - this assumption of risk is therefore an important consideration which should be taken into account by a contractor in deciding to rely on a lien.

It is also important that possession must be continuously[405] maintained because once lost, it cannot be regained. In instances where work is suspended, or possession is voluntarily surrendered or abandoned, the lien will be lost.[406] In

---

400 Possession will be lost if the owner lawfully acquires another set of keys. *See Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) 381 and Ramsden *Mckenzie's Law of Building and Engineering Contracts and Arbitration* 114.

401 Ramsden *Mckenzie's Law of Building and Engineering Contracts and Arbitration* 113. See also *Moss v Begg* 1908 TH 1 where Wessels J. held that merely to erect a notice-board without anything more is insufficient.

402 Nienaber "Construction Contracts" *LAWSA* 9 para 56.

403 Nienaber "Construction Contracts" *LAWSA* 9 para 56. See also Ramsden *Mckenzie's Law of Building and Engineering Contracts and Arbitration* 113, Loots *Construction Law and Related Issues* 421, *Nienaber v Stuckey* 1946 AD 1049 1055 – 1056, *Israelson's Trustee v. Harris & Black and Others* 140 -141, confirmed in *Beetge v Drenka Investments (Isando) (Pty) Ltd* 1964 4 SA 62 (W) 68.

404 See Finsen *The Building Contract* 67 n45 and n74 above.

405 Nienaber "Construction Contracts" *LAWSA* 9 para 55 confirms that temporary absence (for example at the end of a working day) does not result in possession being interrupted subject to the contractor continuing to engage in its work and asserting possession over the site. See also Ramsden *Mckenzie's Law of Building and Engineering Contracts and Arbitration* 113.

406 Nienaber "Construction Contracts" *LAWSA* 9 para 55. Under English law, a contractor may even lose possession through *accessio* (i.e. by affixing materials to the land): J Mackay J (ed) *Halsbury's Laws of England* 4 ed (2003) 854. But see s 47 of the Insolvency Act 24 of 1936 on the position where on the insolvency of the owner, the lien holder hands over the property to

Stellenbosch University https://scholar.sun.ac.za

Savory v Baldochi[407] it was held:

> "It is quite clear that a *jus retentionis* is a passive right, and that right, in a case like the present, is to retain possession of the cart against all the world, until the respondent's claim for the amount of the repairs done to it is satisfied. If he for any reason gives up possession of the cart, and relinquishes his right to hold it, the *jus retentionis* is absolutely gone."

If a contractor subsequently regains possession, the lien will not automatically revive, unless the contractor was deprived of such possession against its consent and in instances of "force[408] or fraud[409] or by some clandestine act[410] on the part of the owner (or, it is submitted, by any wrongful act on the part of a third party)[411] or under urgent and irresistible judicial pressure."[412] In such instances, the contractor may be able to apply to court for a spoliation order[413] for restoration of possession. This will restore control and possession to the contractor, usually without an investigation into the merits.[414] The following was held in *Nino Bonino v De Lange*:

> "It is a fundamental principle that no man is allowed to take the law into his own hands; no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or immovable. If he does so, the Court will summarily restore the status quo ante, and will do that as a preliminary to any inquiry or investigation into the merits of the dispute."[415]

---

the curator or trustee of the insolvent estate. See generally on the continued existence of the lien in such cases: Scott "Liens" *LAWSA* 15(2) para 82.

407 1907 TS 523 525. See also *Morris v Taljaard 1952* (1) SA 49 (C).

408 *Pretoria Racing Club v Van Pietersen* 1907 TS 687.

409 *Donaldson v Est Veleris* 1938 TPD 269; *Hamilton Paneelkloppers v Nkomo* 1991 (2) SA 534 (O).

410 *Sterner v Morom* 20 SC 499; *Ploughall (Edms) Bpk v Rae* 1971 (1) SA 887 (T).

411 *Re Carter; Carter and Carter* (1885) LJ Ch230; *Makhubedu and Another v Ebrahim* 1947 (3) SA 155 (T) 167.

412 Ramsden *Mckenzie's Law of Building and Engineering Contracts and Arbitration* 114. See also *Builder's Depot CC v Testa* 2011 (4) SA 486 (GSJ) where it was found that should a contractor lawfully be dispossessed by a bona fide third, the contractor may lose its right to exercise a lien.

413 RD Claassen *Dictionary of Legal Words and Phrases* (1999) *Mandament Van Spolie* is defined as "The possessor of an object is presumed to be the owner, if he is dispossessed against his will or without his consent by illicit means such as violence, fraud or stealth he is entitled to get a court's order called a *Mandament van Spolie* which orders the dispossessor to restore the object to the applicant. See also *Meyer v Glendinning* 1939 CPD 84 and *Potgieter v Davel* 1966 3 SA 559 (O).

414 D Boshoff "Understanding the Basic Principles of Property Law in South Africa" (30-08-2013) https://cdn.ymaws.com/www.sacqsp.org.za/resource/collection/876D0B9A-72A3-4AA9-B6F8-1BD0B2760F04/PSM_8__-_Basic_Principles_of_Property_Law_-_(CPD).pdf *The South African Council for the Quantity Surveying Profession* (accessed 23-10-2018).

415 *Nino Bonino v De Lange* 1906 TS 120 122. See also *Ploughall (Edms) Bpk v Rae* 1971 (1) SA 887 (T) 891 where this principle was confirmed: "In *Scholtz v. Faifer*, 1910 T.P.D. 243, sê INNES, H.R., te bl. 246: "It is settled law in this Court that a builder has a *jus retentionis* in

Stellenbosch University https://scholar.sun.ac.za

The principles for spoliation are well established and directed at discouraging self-help by an aggrieved party.[416] Dispossession need only to be done "against the consent of the person despoiled and illicitly".[417]

Therefore, possession is the foundation to the exercise of a lien by a contractor and by retaining possession, a contractor prevents an employer from the use and enjoyment of the property or works.

5 2 6 2 Principal Obligation

The second requirement is that of a principal obligation: the party seeking to rely on the lien must be a creditor of the owner of the property, either by way of contract (in the context of a debtor creditor lien) or by way of enrichment (in instances of an enrichment lien).[418]

A debtor and creditor lien, widely utilised in the construction context, presupposes a principal obligation founded in contract.[419] Simply put, it is the right of a contractor to retain possession of the site and the works until paid for work done. Reliance on a debtor and creditor lien presupposes not only that the contractor is entitled to payment, but also that the employer's debt is due: such a lien cannot be exercised in respect of a future debt.[420]

---

respect of the building erected by him, for his utiles impensae; that was decided in *United Building Society v. Smookler's Trustees and Golombick's Trustee,* 1906 T.S. 623. . .That right terminates with the loss of possession unless the possession is taken away by undue means. *Pietersen's* case, following upon *Bonino's*, decided that. . .he is entitled to apply to Court for a summary order of restitution. . ." INNES, H.R., sê vervolgens: Now a person who applies for such an order must satisfy the Court upon two points; that he was in possession of the work at the date of the alleged deprivation, and that he was illicitly ousted from such possession. . .the possession which must be proved is not possession in the ordinary sense of the term—that is, possession by a man who holds pro domino and to assert his rights as owner. It is enough if the holding is with the intention of securing some benefit for himself as against the owner." Note that an employer will not be able to rely on the provisions of the Prevention of Illegal Eviction from Unlawful Occupation of Land Act 19 of 1998 in such instances – see *Andries van der Schyff en Seuns (Pty) Ltd t/a Complete Construction v Webtrade Inv No 45 (Pty) Ltd and Others* 2006 (5) SA 327 (W) and Ramsden *Mckenzie's Law of Building and Engineering Contracts and Arbitration* 114.

[416] Anonymous "Builder's Lien Triumphs, Owner not to take Law into Own Hands" (28-07-2015) https://www.stbb.co.za/wp-content/uploads/stbb_plu28-2015_s2.pdf *STBB* (accessed 25-09-2017).

[417] See *Nino Bonino v De Lange* 1906 TS 120 122.

[418] Wiese (2014) *PER/PELJ* 2547. See also *Howes & Clover (Pty) Ltd v Ruskin & Others* 1978 (1) SA 99 (W).

[419] Scott "Liens" *LAWSA* 15(2) para 69 and see above n379.

[420] Finsen *Building Contract* 67. Ramsden *Mckenzie's Law of Building and Engineering Contracts*

Stellenbosch University https://scholar.sun.ac.za

The exercise of an enrichment lien is dependent upon whether the requirements for the existence of an obligation on the basis of unjustified enrichment are met.[421] This will be the case where the estate of the owner is enriched and that of the contractor impoverished, such enrichment was at the expense of the contractor, (it must be causally related to the conduct of the contractor) and must be unjustified (*sine causa*) in that there is no legal ground justifying the retention of the benefit by the owner.[422] The duty that arises for the owner – and which is secured by the lien – is to restore the enrichment "up to the level of the [contractor's] impoverishment" or, as it is more customarily put, the quantum of the enrichment claim is the lesser of either the owner's enrichment or the contractor's impoverishment.[423]

The general requirements of enrichment in this context are manifested in the requirements developed in respect of what is nowadays styled "enrichment by imposing"[424] - actions traditionally recognised in the cases of enrichment resulting from the expenditure of money, material or work (or all of these) by certain categories of persons in respect of the property of others.[425] On the traditional approach, a building contractor who has not performed under a valid contract is regarded as a lawful occupier, and dealt with on the same basis as a *bona fide*

and Arbitration 115. Therefore, a contractor will not have a right to exercise a lien in respect of retention money that has not yet fallen due. See *Conress (Pty) Ltd and Another v Gallic Construction (Pty) Ltd* 1981 (3) SA 73 (W) 76.

421 This was confirmed in *Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons* 1970 (3) SA 264 (A), where Botha JA held that "Waar daar geen verryking vir die eienaar saak is nie, kan geen sodanige retensiereg tot stand kom nie". The view enunciated here that the requirements for enrichment in respect of a lien differ from that for a full-blown action, and that a lien could be relied upon even where no action lay, was rejected in *Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd and Another* 1996 (4) SA 19 (A). See Du Plessis *The South African Law of Unjustified Enrichment* 289-290; Pienaar & Stevens "Rights in Security" in *Mixed Legal Systems in Comparative Perspective: Property and Obligation in Scotland and South Africa* 782; Scott "Liens" *LAWSA* 15(2) para 55.

422 DP Visser "Enrichment" in WA Joubert & JA Faris *LAWSA* 17(3) 3rd ed, (2018) para 206, Du Plessis *The South African Law of Unjustified Enrichment* 1.

423 Visser "Enrichment" *LAWSA* 17(3) para 206, Du Plessis *The South African Law of Unjustified Enrichment* 380-381.

424 I.e. the imposition of a benefit on another without their consent. Visser "Enrichment" *LAWSA* 17(3) para 210.

425 Through the legal relationship between the parties and, the intention of the contractor, distinction was historically drawn between the *bona fide* possessor, the *bona fide* occupier, the lawful occupier, *mala fide* possessor and the *mala fide* occupier with this distinction dictating the success or failure of the enrichment claim. Whilst the state of mind and according intention is still important, this no longer serves as the main consideration in the outcome of the enrichment claim and more emphasis is placed on nature of the expense incurred. Du Plessis *The South African Law of Unjustified Enrichment* 277.

Stellenbosch University https://scholar.sun.ac.za

possessor and occupier.[426]

The element of enrichment is established with reference to the nature of the expenses incurred. It was confirmed in *FHP Management (Pty) Ltd v Theron and Another*,[427] that an improver must prove the necessity or usefulness of the improvements or that such improvements had sustained or increased the market value of the property.[428]

Necessary expenses are regarded as enriching the owner on the theory that the owner would have incurred the same expenses to preserve the property and the owner's estate is consequently enriched by being saved from the need to do so.[429] Regarding the impoverishment of the improver, the recovery is limited to actual expenditure and does not extend to profit for labour.[430]

According to Visser, the requirement that enrichment be *sine cause* or without legal ground, is "not addressed directly" in cases of imposed enrichment: instead "the carefully delineated parameters of each of the traditional remedies determine when retention of a benefit that has been obtruded on someone is unjustified."[431] Du Plessis indicates that it is "hardly self-evident" how the *sine causa* requirement is to be applied in this context,[432] but asserts that in principle the presence of a "typical legal ground" for retaining the benefit should exclude an action.[433] Therefore, should expenditure be incurred pursuant to a valid contract, this will constitute a typical ground,[434] so that recovery will lie in contract and not on the basis of unjustified enrichment.[435] However, the mere fact that improvements are not

---

426 *D Glaser & Sons (Pty) Ltd v The Master* 1979 (4) SA 780 (C) 790; Du Plessis *The South African Law of Unjustified Enrichment* 275; but see Scott "Liens" *LAWSA* 15(2) para 55.

427 2004 (3) SA 392 (C) 517; Du Plessis *The South African Law of Unjustified Enrichment* 277; Visser "Enrichment" *LAWSA* 17(3) para 234; Scott "Liens" *LAWSA* 15(2) para 63.

428 See Du Plessis *The South African Law of Unjustified Enrichment* 269-270 on the valuation of improvements.

429 Scott "Liens" *LAWSA* 15(2) para 63. Recovery depends on the expenditure being effective: see Visser "Enrichment" *LAWSA* 17(3) para 234.

430 Du Plessis *The South African Law of Unjustified Enrichment* 269-270.

431 Visser "Enrichment" *LAWSA* 17(3) para 228.

432 Du Plessis *The South African Law of Unjustified Enrichment* 270.

433 270 and generally at 53-54.

434 270 and 53-54 with reference to *McCarthy Retail Ltd v Shortdistance Carriers* 2001 (3) SA 482 SCA.

435 In such cases there is in fact no question of imposed or unauthorised enrichment at all: see Du Plessis *The South African Law of Unjustified Enrichment* 270 n12.

Stellenbosch University https://scholar.sun.ac.za

supported by such a typical ground, does not automatically let in an enrichment claim and enrichment as a result of unauthorised improvements will only be regarded as unjustified if further requirements embedded in the traditionally recognised actions of the various categories of improvers are met.[436]

The requirement that enrichment should be at the expense of the plaintiff is problematic in situations where someone effects improvements on another's property pursuant to an agreement with a third party.[437] In such cases, claims have been excluded on the basis that the enrichment of the owner does not result from the activities and impoverishment of the contractor, but occurs at the expense of the third party against whom the contractor has a contractual claim.[438] Du Plessis, however, criticises this view for failing to have regard to differences between the various factual scenarios that might occur and also for taking too narrow a view of the at the expense of requirement. Impoverishment is a factual or "economic" matter, and not done away with by the mere existence of a contractual claim against a third party. Where the latter is unwilling or unable to pay the improver, the latter's impoverishment is real and the causal link with the enrichment of the owner indubitable.[439]

What is required in these situations therefore, is a nuanced approach, with due regard also to the fact that even if the impoverishment of the improver is in a particular case directly related to the enrichment of the owner, the claim might still be excluded because the existence of a contract constitutes a legal ground for the retention of the benefit by the owner.[440]

---

436 Du Plessis *The South African Law of Unjustified Enrichment* 270 and 53-54.

437 Visser "Enrichment" *LAWSA* 17(3) para 228. See Du Plessis *The South African Law of Unjustified Enrichment* 299-306 on various possible scenarios that might occur, often involving variants on the sub-contracting situation.

438 See for example W de Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* 3rd ed (1987) 346 - 356; *Gouws v Jester Pools (Pty) Ltd* 1968 (3) SA 563 (T).

439 Du Plessis *The South African Law of Unjustified Enrichment* 300.

440 Du Plessis *The South African Law of Unjustified Enrichment* 300-306 and especially the remarks at 302- 303 in respect of the so-called "subcontractor" cases.

Stellenbosch University https://scholar.sun.ac.za

5 2 6 3 Land should not belong to the State

There is some authority for the view that no one may, in law, acquire a lien over State owned land.[441] Therefore, if this assertion is correct, in a construction context where the State is the employer and owner of the land, the contractor may not enjoy a lien. This rule is supported by many of the Roman-Dutch jurists such as Voet, Matthaeus and Wissenbach and has been argued to form part of South African law.[442] References favouring the rule in the case law amount to *obiter dicta*, however,[443] and in the absence of recent judicial pronouncements, it is arguable that the supposed exception has been abrogated by disuse.[444]

5 2 6 4 Circumstances which affect the existence of a lien

An employer may, against the tender of alternative security for payment of the outstanding contract price, apply to the court for an order to restore possession of the property[445] and, the court is empowered with the discretion to order the contractor to restore possession to the employer.[446] In *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*[447] it was held:

"As the holder of a lien, the appellant's right of possession is not absolute. The

---

441 Finsen *Building Contract* 67. For the definition of "organ of State" see section 239 of the Constitution.

442 Y Raffie, J Whittle & E Pabian "Does a builder enjoy a lien over state owned property?" (16-11-2017) https://www.cliffedekkerhofmeyr.com/en/news/publications/2016/dispute/dispute-resolution-alert-16-november-does-a-builder-enjoy-a-lien-over-state-owned-property.html *CDH* (accessed 13-09-2017).

443 Y Raffie, J Whittle & E Pabian "Does a builder enjoy a lien over state owned property?" *CDH.* See also *Hunter & Turpin v Standard Bank, Pietermaritzburg* (1883) 4 NLR 49, *The Colonial Government v Smith, Lawrence & Mould and Others* (1885 – 1886) 4 SC 194 and *Provincial Administration (O.F.S) v John Adams & Co* 1929 OPD 29.

444 Y Raffie, J Whittle & E Pabian "Does a builder enjoy a lien over state owned property?" *CDH.* In support of this statement, see *Vuka-Uzenzele Plant Hire & Civils CC v Ho Hup Corporations (SA) (Pty) Ltd* [2010] ZAECPEHC 54 20 -21 where it was held: "Consequently the contention by the first Respondent that the applicant did not have a right of lien over the properties because such a right does not exist over state property…Even if I had to consider these arguments by the First Respondent, I was not referred to any authority, and I could not find any, in support of the submission that no right of lien exists over state property." See also Scott "Liens" *LAWSA* 15(2) para 62 with reference to *Land Bank v Mans* 1933 CPD 625.

445 See *Trustees of Smookler v Golombick* 1905 TH 221 222 and *Hasewinkel v Simoes* 1966 (2) SA 81 (W) 84 where it was held: "This Court seems to me to have inherent jurisdiction to come to the assistance of the owner to prevent injustice and, in order to do justice as between man and man, may order delivery to the owner against adequate security."

446 Nienaber "Construction Contracts" *LAWSA* 9 para 55. See also Ramsden *Mckenzie's Law of Building and Engineering Contracts and Arbitration* 115 and *Grafton House, Ltd. v White and Co* 1923 WLD 117 121 – 122 where the court indicated that in instances where an architect has given a certificate where there is a large amount due to the contractor, and only a small proportion of that amount is paid into court, it would be inequitable for the court to remove the contractor and repossess the owner.

447 2008 (3) SA 371 381.

Stellenbosch University https://scholar.sun.ac.za

owner can recover possession by putting up satisfactory security."

A court will assess each case and make a decision based on the individual facts of each case.[448] The court will not make an order which in any way diminishes the security afforded by the lien, by for example, requesting less security than the amount of the contractor's claim.[449]

In some circumstances, an owner may avoid liability by affording the lienholder a right to remove the improvement. This right of removal (*ius tollendi*) is largely determined by the nature of the expense;[450] in the instance of necessary expenses, as the employer would have in any event incurred the expenses, this right of removal is not available. In the instance of useful expenses, the court may in determining whether to allow for removal of the improvement or an enrichment claim exercise discretion, taking into account a number of factors[451] and, in the instance of luxurious remedies, this right of removal may serve as the only remedy available to the lienholder.[452]

5 2 6 5 Lien should not be contracted out of

As a lien is a remedy, it will always be available to an innocent contractor unless the parties have agreed otherwise. It is therefore common in the industry for an employer to request a contractor to waive its right to exercise a lien against the provision of adequate security (usually in the form of a payment guarantee).[453]

---

448 See *Spitz v Kesting* 1923 WLD 45 where it was held: "Each case will depend on its own particular facts, and the Court, in exercising its discretion, will have regard to what is equitable under all the circumstances."

449 Ramsden *Mckenzie's Law of Building and Engineering Contracts and Arbitration* 115.

450 Du Plessis *The South African Law of Unjustified Enrichment* 294.

451 Severability and the according separation of the improvement are critical considerations, but do not oblige a court to award an enrichment claim if separation is not feasible. The desires of the owner (a willingness or unwillingness to pay for the improvements) and whether the owner has the means to pay for the improvements are also taken into account by the court. See Du Plessis *The South African Law of Unjustified Enrichment* 295.

452 Du Plessis *The South African Law of Unjustified Enrichment* 295.

453 Finsen *Building Contract* 67. A typical example is when finance for a building project is provided to the employer through a financial institution. In such instances, it is likely that the financial institution will require the employer to obtain a lien waiver from the contractor, so that, should the employer default on its payments to the financial institution, the latter will be able to execute against the property without any encumbrances. The waiver need not be a total one: it can be selective. The waiver can be limited to the financial institution which will safeguard the financial institution's interests while still preserving the contractor's right to exercise his lien against the employer. See also *Sandton Square Finance (Pty) Ltd v Vigliotti* 1997 (1) SA 826 (W) and *Pheiffer v Van Wyk* [2015] JOL 33632 (SCA). An alternative form of security would be to couple the waiver with a cession by the employer so that the mortgagee can directly pay the contractor

Stellenbosch University https://scholar.sun.ac.za

5 2 7 Liens in the Construction Context

There is support for the view that both debtor and creditor and enrichment liens may be relied upon by a building contractor.[454] In *United Building Society v. Smookler's Trustee,*[455] it was said that

> "…Now a builder clearly has a debtor and creditor lien, and where (as in most cases) the contract is between the builder and the employer or his concurrent creditors there is no doubt that the lien goes to the full amount of his expenses"

but also that, at least in cases where a builder has acted in good faith,

> "we fail to see why he has not as against third parties the general rights which the law gives to anyone who spends money on the preservation or improvement of another person's property".

In *D Glaser & Sons (Pty) Ltd v The Master*[456] also, it was confirmed that:

> "While the performance of work pursuant to a building contract will result in a debtor-creditor lien (*United Building Society v Smookler's Trustees and Ano.*, supra) which comes into existence when the builder takes possession of the site … and endures until he is paid his contract price provided he retains possession …, it does not follow that such work will result in only such a lien. Should the builder have incurred useful expenses … or necessary expenses … he will, in my opinion, have the appropriate real liens over the land and structures upon which he has worked. These liens are "real" liens …. They are real rights (… *Brooklyn House Furnishers (Pty) Limited v Knoetze and Sons* (supra at 271C-D). They are not created by contract".

The view held by these cases, that a contractor would apart from any debtor and creditor lien also, to the extent that it effects necessary or useful improvements, be entitled to rely on an enrichment lien, dramatically extends the protection afforded to a contactor. Whilst an enrichment lien would not secure the contractor's claim for payment of the outstanding contract price, it would still serve to avail against all third

---

proceeds of the loan – see Anonymous "Contractual and Legal" *Master Builders Association*. See also *NBS Bank Bpk v Dirma BK en 'n Andere* 1998 (1) SA 556 (T).

[454] Scott "Liens" *LAWSA* 15(2) para 50, 58, 69 and 70. According to Nienaber "Construction Contracts" *LAWSA* 9 para 54 "a debtor and creditor lien is "available to the contractor against the employer only for payment of what remains due to it under the contract. It is designed to buttress the contractor's claim for payment, not as a cause of action in itself but as a means of resistance should the employer demand repossession of the premises without tendering payment for work done on it". An enrichment lien is said to be available "Where the contractor's expenditure preserved the property or enhanced its market value the contractor has, to the extent of the building owner's enrichment, an enrichment lien valid against all comers, including the employer."

[455] 1906 TS 623 at 631 and 633.

[456] 1979 (4) SA 780 (C) 788. See also Ramsden *Mckenzie's Law of Building and Engineering Contracts and Arbitration* 111.

Stellenbosch University https://scholar.sun.ac.za

parties (such as successors in title, creditors of the owner and (prior) mortgagors) and, would entitle the contractor a preference in *concursus creditorum.*

Whether the view asserted in these cases is well founded, is questionable, however. The reliance in both judgments on the equitable principle enunciated in *Digesta* 50.17.206 that "by the law of nature it is only fair that nobody should become wealthier through the loss and injury of another",[457] cannot override the requirement that the enrichment must be without legal ground. In an organised construction context, improvements would invariably be made pursuant to a construction contract,[458] which would constitute a legal ground for retention of the benefits of the work by the employer. This would accordingly exclude an enrichment action by the contractor. In turn, an enrichment lien could therefore not be relied upon against "all comers". The equation, in the *Glaser* case, of the position of a builder who contracts with someone who is not the owner of the property and so enriches the owner and that of a builder who contracts with the owner of the property, [459] is unpersuasive for the same reason.

Whether a subcontractor would meet the requirements for the exercise a lien in instances of non-payment by the contractor raises a number of questions. For a number of reasons it is likely that a subcontractor may be precluded from exercising a lien against an owner to compel performance by a contractor.[460] Arguably a subcontractor would be unable to meet the possession requirement as in many instances, it is not afforded possession of the works or site but is merely provided with access.

In respect of the principal obligation requirement, a subcontractor would also have difficulty meeting this requirement in the context of debtor-creditor liens; there is no contractual nexus between the owner (as employer) and the subcontractor. Accordingly, there is no privity of contract and no principal obligation and the

[457] *United Building Society v. Smookler's Trustee* 1906 TS 623*627; D Glaser & Sons (Pty) Ltd v The Master* 1979 (4) SA 780 (C) 780.
[458] See discussion above and Du Plessis *The South African Law of Unjustified Enrichment* 270.
[459] *D Glaser & Sons (Pty) Ltd v The Master* 1979 (4) SA 780 (C) 789.
[460] See Loots *Construction Law and Related Issues* 417 – 420 and The *Colonial Government v Smith, Lawrence & Mould, and Others* (1885-1886) 4 SC 194. See also *Jointshelf 117 CC and Others v Close – By Security CC v Close by Security* [2007] ZANWHC 55.

Stellenbosch University https://scholar.sun.ac.za

existence of a debtor-creditor lien cannot be asserted.

In respect of enrichment liens, it is also questionable whether a subcontractor, would be able to meet the principal obligation requirement and claim from an owner on the basis of enrichment[461] and it seems that the possibility of reliance by the subcontractor on an enrichment lien against the owner seems slim.[462] However, it has been asserted that in exceptional circumstances, such as where the owner has not paid the contractor or where the owner acted in bad faith, it may be equitable to award an enrichment claim.[463]

Therefore, it seems that liens are generally not available to a subcontractor in an "organised construction context" where a subcontractor is in contract with the contractor who is, in turn, in contract with the employer as owner of the land. This position may however differ in more unusual instances where, for example, a contactor builds on land which does not belong to the employer.[464]

These conclusions are supported by *Wynland Construction (Pty) Ltd v Ashley-Smith and Others*[465] where it was held that to allow a subcontractor a lien is problematic:

> "It would lead to the absurd result that an owner could be held to ransom by a subcontractor who refuses to give up possession despite the fact that the owner

---

461 If the owner has paid the contractor for the subcontract services performed, arguably the owner's estate has not been enriched. Furthermore, there is a legal ground for the enrichment entering the owner's estate through the contract between the owner and the contractor. See Du Plessis *The South African Law of Unjustified Enrichment* 302 – 303. Du Plessis also considers the argument that a judicial discretion should exist in such instances but highlights that this may be practically problematic giving examples such as where the value of the improvements (and according value claimed by the subcontractor) are more than what the owner agreed to pay the contractor for the subcontract works. In instances where the contractor is insolvent, the principle of *paritas creditorum* may be upset. An owner would also not be afforded the contractual defences against the subcontractor as against the contractor.

462 See Du Plessis *The South African Law of Unjustified Enrichment* 270 and Visser "Enrichment" *LAWSA* 17(3) para 209; *Howes & Clover (Pty) Ltd v Ruskin and Others* 1978 (1) SA 99 (W); *Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd and Another* 1996 (4) SA 19 (A). Scott "Liens" *LAWSA* 15(2) para 58 n4.

463 See Du Plessis *The South African Law of Unjustified Enrichment* 303. Du Plessis also gives the example of bad faith to be instances where the owner knows that it will never be called upon to pay the contractor. Another instance could be where the owner is aware that the contractor intends not to pay the subcontractor upon receiving payment from the owner.

464 See Du Plessis *The South African Law of Unjustified Enrichment* 299 – 302.

465 1985 (1) SA 534 (C) 539. Also see Loots *Construction Law and Related Issues* 93 and *The Colonial Government v Smith, Lawrence and Mould* (1886) 4 SC 194.

Stellenbosch University https://scholar.sun.ac.za

> is obliged to pay (and might already have paid) in terms of the building contract. An owner might thus be compelled to pay twice in order to recover his property. It strikes me as most inequitable. The claim of the unpaid subcontractor lies against the contractor and not the innocent owner."

It is therefore advisable that a subcontractor does not rely solely on the potential right to exercise a lien and should also look to other remedies to protect against non-payment by a contractor.[466]

Therefore, under the South African law in an organised construction context, a contractor may have, through reliance on a debtor creditor lien, a direct performance mechanism, to encourage performance from a defaulting employer.

5 3 UAE Law

The Civil Code recognises the concept of a possessory lien and, whilst not formally titled as such, this remedy embodied in Articles 416[467] and 879[468] of the Civil Code, closely resembles the concept of a lien as understood in South African law.[469]

However, possessory liens are scarcely utilised by contractors in the UAE. The reasons for this are not clear but, may be largely attributable to practical problems arising from the exercise of a lien, together with the vagueness of the provisions of the Civil Code regarding the requirements for the existence of a lien and, in addition, a lack of precedent elaborating these elements on a case by case basis.

Article 416[470] is the starting point and is of general application to all innominate contracts.[471] Article 416 says:

> "Any person who has incurred necessary or beneficial expense on property of another in his possession may refuse to return such property until he recovers

---

466 Some standard form contracts attempt to provide some form of protection for subcontractor for example, requiring that an architect is provided with proof that the subcontractor was indeed paid by the contractor.

467 For similar provisions in Gulf jurisdictions see Bahrain Civil Code Article 240; Kuwait Civil Code Article 318; Oman Civil Code Article 289 and Qatar Civil Code Article 280.

468 Oman Civil Code Article 633 contains an equivalent provision.

469 A MacCuish & N Newdigate "Liens and Priority Rights – 'self-help' remedies for the disgruntled contractor under UAE Law?" (12-05-2016). http://www.mondaq.com/x/490630/Building+Construction/Liens+and+Priority+Rights+selfhelp+remedies+for+the+disgruntled+contractor+under+UAE+Law *Mondaq* (accessed 25-09-2017).

470 This Article falls within Chapter 1, Section 3 (6) which is titled "Rights of Retention".

471 Grose *Construction Law in the United Arab Emirates* 194.

Stellenbosch University https://scholar.sun.ac.za

> what is due to him at law, in the absence of an agreement or provision of law to the contrary."

Article 879(1) and (2), are specifically applicable to *muqawala* and go on to state the following:

> "If the work of the contractor produces (a beneficial) effect on the property in question, he may retain it until the consideration due is paid. And if it is lost in his hands prior to the payment of the consideration, he shall not be liable to the loss, nor shall he be entitled to the consideration.
>
> If his work produces no (beneficial) effect on the property, he shall not have the right to retain it pending payment of the consideration, and if he does so and the property is lost, he shall be liable in the same manner as if he had misappropriated it."

The general provisions governing rights of retention[472] are arguably applicable to and to be read in conjunction with the right of a contractor to exercise a possessory lien under Article 879.[473]

Therefore, Article 416 read with Article 879 provides the remedy of a possessory lien to "any [contractor] who has incurred necessary or beneficial expense on the property of another in his possession". This remedy has its origin in the Civil Code and is available to contractors in instances when a construction contract has been terminated.[474]

On a straightforward reading of this Article, it is clear that in order for an innocent contractor to exercise such a remedy with the intention of exacting compliance from a defaulting employer, certain requirements must be met.

First, the property must be in the possession of the person. Should such possession be lost, the innocent party will lose the right to exercise the lien. Article 419(1) says:

> "The right of retention will be extinguished if the thing passes out of the hands of the person in possession or control in the absence of any provision of law to the contrary."

---

472 Article 414 – Article 419 of the Civil Code.

473 Grose *Construction Law in the United Arab Emirates* 195.

474 Grose *Construction Law in the United Arab Emirates* 193. It is also important to note that the parties can agree that the contractor will not exercise its right of retention and that Article 879 is not categorised as a "mandatory" provision of the Civil Code.

Stellenbosch University https://scholar.sun.ac.za

However, the contractor has a remedy and will be able to demand, within a specified period, that the property is restored to him, provided that it passed out of his possession without his knowledge or despite any objections made it.[475]

Secondly, the contractor must have incurred an expense which should have been necessary or beneficial and "on the property of another". This confirms the position under Article 879, which requires that "the work of the contractor produces (a beneficial) effect on the property". The exact definition of "beneficial effect" is unclear, but on a straightforward reading can be taken to refer to:

> "an effect which created any increase in the value of, or in some way improves, the property."[476]

Consequently, in instances where no beneficial effect is created on the property, retention of the possession of the property by the contractor would be unlawful – a beneficial effect is necessary in order for the contractor to lawfully rely on Article 879.[477] In amplification, Article 879 says that in such a case, if the property is lost, the ensuing consequences would be similar to an instance where the contractor had misappropriated it.[478]

Pausing here, it is necessary to compare this to instances where the contractor, under Article 879(1) is lawfully retaining the property and the property is lost prior to payment of the consideration. In such instances, the contractor will not be liable for the loss, but will also not be entitled to the consideration. The position on risk under Article 879 is amplified by Article 417(1) of the Civil Code, which requires that the innocent party preserves the property in its possession.[479]

---

475 See Article 419(2) which says: "Nevertheless, it shall be permissible for a person who retains a thing which passes out of his possession either without his knowledge or despite his objection to require within thirty days from the time he learns of its having so passed and prior to the expiration of one year of its having so passed that it be restored to him."

476 In some instances, the existence of a beneficial effect will be obvious, but a beneficial effect will be more difficult to identify in other instances, such as where the works are found to be defective or incomplete. See A MacCuish & N Newdigate "Liens and Priority Rights – 'self-help' remedies for the disgruntled contractor under UAE Law?" *Mondaq*.

477 A MacCuish & N Newdigate "Liens and Priority Rights – 'self-help' remedies for the disgruntled contractor under UAE Law?" *Mondaq.*

478 An alternative translation for the Arabic word "تلفت:" is "damaged". Ultimately the purpose of this clause is to allocate risk to the contractor.

479 Article 417(3) provides further that, with the leave of the court, an innocent party may sell the property if it fears the property "may suffer loss or deterioration…and the right of retention of a thing shall pass to the proceeds of the sale thereof."

Stellenbosch University https://scholar.sun.ac.za

It is likely that more than one contractor[480] can exercise a lien over the same property or portion of the same property, as the Civil Code does not call for exclusive possession by a party for the valid exercise of a lien.[481] However, it is important to note that a lien cannot be exercised over property belonging to the State.[482]

It is necessary to briefly acknowledge Article 1527 of the Civil Code[483] which also categorises priority rights[484] as liens[485] with the title of Chapter 3 of the Civil Code being "Priority Rights (Liens)". This provision of the Civil Code is specific to contractors and building engineers and says the following:

> "(1) Amounts due to contractors and building engineers who have undertaken to construct buildings or other installations, or to reconstruct, repair or maintain the same, shall have the status of a priority right over such structures, but to the extent to which it exceeds the value of the land at the time of sale, by reason of such works.
>
> (2) Such priority right must be registered and it shall rank as from the time of registration."

A priority right under this Article 1527 is not comparable to the commonly accepted definition of a lien as a retention right, as it does not offer tangible security (through possession) over the employer's property; instead it guarantees the contractor priority for any claim which has increased the value of the proceeds of the sale of

---

480 Note that the right to exercise a lien by a subcontractor against an employer is not available as Article 891 of the Civil Code says that "a sub-contractor shall have no claim against the employer for anything due to him from the first contractor…"

481 The ranking of such contractors will also prove problematic. Article 418 does not assist in instances where there is more than one contractor exercising a lien and says that "any person who retains a thing in the exercise of his right of retention thereof has a prior right over other competing creditors for the satisfaction of his rights thereof." See also Article 1527 where "a contractor may protect its rights in a more conventional manner by registering a priority right over buildings or other works in order to secure payment for the improvements and work performed on such buildings or works." - Brendal et al (2010) 24 *Arab Law Quarterly* 315.

482 See Article 247(1)(i) of the Civil Procedure Law No. 11 of 1992, Article 103(2) of the Civil Code, Dubai Law No. 3 of 1996 and Brendal et al (2010) 24 *Arab Law Quarterly* 309.

483 For similar provisions see Bahrain Civil Code Article 1053, Kuwait Civil Code Article 1081, Qatar Civil Code Article 1185.

484 See Article 1504 of the Civil Code which defines a priority right as "a specific right over property following (such property), conferring upon the obligee priority status in obtaining his right in accordance with his bargain and as acknowledged by law."

485 Article 110(2) of the Civil Code defines a lien as a "consequential property right" as opposed to an "original property right". It is questionable if this definition is applicable to possessory liens originating from Article 879 of the Civil Code as the title "Lien" is not attributed to the mechanism contained in these clauses.

Stellenbosch University https://scholar.sun.ac.za

the employer's property.[486]

Furthermore, in order to be effective, this priority right will need to be registered and whilst the mode of registration is not clear from the Civil Code, it can be assumed that such registration will take place in a similar manner to the registrations of pledges and mortgages in the land registry.[487] Whilst in theory there is a slight degree of comfort afforded by priority rights, the operation of such rights in practice is uncertain and rarely utilised by contractors.[488]

There is little guidance and no precedent for contractors to follow when seeking to exercise a lien under UAE law. This uncertainty coupled with perceived practical difficulties, results in few contractors opting to utilise this remedy to compel specific performance by a non-performing employer.

5 4 The Red Book

The Red Book does not make provision for, nor does it expressly prohibit the exercise of a lien by the contractor.[489] Therefore the governing law of the Red Book in each and every instance will be of particular importance when determining whether a contractor may lawfully exercise a possessory lien and, if so, the procedure to do so.

Whilst the Red Book does not make express provision for the exercise of a possessory lien, it may be contended that, through implication, Article 16.3 creates a right for an unpaid contractor, on termination, to exercise a possessory lien under the Red Book.[490]

Article 16.3 provides:

> "After a notice of termination has taken effect the Contractor shall cease all

---

486 Grose *Construction Law in the United Arab Emirates* 196.

487 Grose *Construction Law in the United Arab Emirates* 196. See also Article 9 of Law No. (7) of 2006 concerning Real Property Registration in the Emirate of Dubai.

488 Grose *Construction Law in the United Arab Emirates* 196 – 197.

489 The Red Book does however require at cl 7.7 that each item of plant and material becomes the property of the Employer - free from liens and other encumbrances. A contractor would need to ensure that a supplier has waived its right to a lien to prevent it finding itself in breach of the main contract.

490 Grose *Construction Law in the United Arab Emirates* 362.

Stellenbosch University https://scholar.sun.ac.za

> further work, hand over Contractor's Documents, Plant, Materials and other work for which the Contractor has received payment and leave the Site".

Ownership of Plant and Materials will be transferred to the employer, irrespective of payment, upon delivery of such items to the site.[491] However, despite such a transfer of ownership a contractor is under clause 16.3 entitled to retain and need not hand over work for which payment has not been received including documents, Plant and Materials. This, in effect entitles the contractor to exercise a contractual lien[492] over such items.[493] The exercise of such a lien, in all likelihood, will coax a non-performing employer into complying with its payment obligation.

Liens have a tenuous and speculative presence in the Red Book. Whilst the reasons for this are not clear, it can possibly be asserted that due to the divergence between the legal systems, the differences in approach to liens could not be harmonised into a single approach suitable to all legal systems. The original drafting of the FIDIC Suite of Contracts was largely based on English law[494] and the treatment of liens under this system differs from under Civilian systems.[495]

It can accordingly be speculated that this divergence was resolved by the provisions of the Red Book remaining silent so as to allow the provisions of the governing national legal system to rule the existence and, if applicable, the operation of a lien

---

491 See cl 7.7 of the Red Book.

492 It is important to note that the possessory lien after termination is limited, as cl 16.3 requires the contractor to "leave the site". Should a contractor fail to do so, remaining in possession of the site, a contractor would arguably be in breach of the contract provisions. Therefore, it may not be tenable to argue that a contractor has the right to a lien over the site based on this clause. Further as Grose indicates "if such Plant and Material have been delivered into the custody and control of the employer, for example to a laydown area controlled by the employer, the lien is ordinarily extinguished." Grose *Construction Law in the United Arab Emirates* 362. This will be because the contractor will be unable to meet the requirement of possession. Therefore, it may even be asserted that the contractor's right to a exercise lien is limited to Plant and Materials which are not in the vicinity of the site, making the operational scope of a lien after termination of the contract very limited, especially as in some instances the provisions of the Red Book will take precedence over the governing law; this may potentially result in conflict between the Red Book and the governing law regarding the existence and operation of a lien.

493 Grose *Construction Law in the United Arab Emirates* 362.

494 The original form of the FIDIC Contract closely mirrored the 4th edition of the ICE Conditions of contract. See N Gould "An Introduction to FIDIC, International Procurement and Development Bank Procurement*"* *(*26-04-2016*)* *ICE* https://www.ice.org.uk/ICEDevelopmentWebPortal/media/Documents/News/Membership/FIDIC-paper-26-27-April-2016.pdf (accessed 03-07-2018). See also See C Wade "The FIDIC Contracts and Current Trends" *Society of Construction Law.*

495 Despite English law recognising liens as a legal right to possess property until a claim is met, the types of liens, classification and operation of such liens are largely divergent to those under a civilian system. See Wiese 2017 *TSAR* 98.

Stellenbosch University https://scholar.sun.ac.za

as a self-help remedy.[496] Therefore, in instances prior to the termination, where an unpaid contractor wishes to rely on a lien, the contractor will need to turn to the provisions of the governing law.

Whilst this approach is suitable under legal systems where the existence and operation of liens are sufficiently regulated (such as South Africa), difficulties present themselves in jurisdictions where this concept is underdeveloped and lacks legal certainty. This often results in misuse or disuse, depriving an innocent party of a powerful self-help remedy.

5 5 Comparison

Whilst liens are not resorted to with the same frequency under South African law and the Civil Code, parallels are identifiable between liens in both jurisdictions. Fundamentally, in both systems, aggrieved parties will have a right of retention in instances where the aggrieved party has incurred "necessary or beneficial" expense on the property of another. Furthermore, the requirements for the valid exercise of a lien are similar in both jurisdictions.

A requirement under the South African law is that the contractor must be a creditor of the employer either by way of contract or through enrichment. This is in contrast to the Civil Code where the requirement is not as sophisticated and does not distinguish the underlying cause by which the contractor incurred a "beneficial expense on the property of another" – this approach arguably telescopes liens under South African law into a single institution. Notwithstanding this lack of distinction, the nature of this requirement under both systems is comparable and it is clear under both systems is that the expense must have been actually incurred by the contractor.

Common to both systems is the requirement of possession. Continuous possession is required, with both systems providing for recourse in instances where an aggrieved party is unlawfully deprived of such possession. Under South African law and UAE law, the aggrieved party must be dispossessed without its consent, but under UAE law, reliance on this recourse is subject to express stand-alone time

[496] In the 2017 edition of the Red Book, the existence of a lien remains as tenuous as under the 1999 edition.

Stellenbosch University https://scholar.sun.ac.za

limitations and must be exercised within such time frames.

Under South African law, the concept of possession has been developed by the recognition that apart from the element of physical control, the intention of the holder is also relevant to determine whether an aggrieved contractor is effectively in possession of the works. This elaboration is most certainly helpful when determining whether, in view of the range of possibilities that might occur, a contractor can be said to have met the requirement of possession.

Whilst in possession, the allocation of risk and ensuing consequences in respect of loss or damage to the works or site differs. Under UAE law, whilst the contractor is obliged to preserve the property in its possession, if the property is "lost", the contractor will not be liable for the loss but will not be entitled to consideration. This is in contrast to South African law where the contractor carries the risk and, will remain responsible for loss or damage to the site or works whilst in its possession.

As neither system calls for exclusive possession, it is likely that a multiplicity of contractors may exercise a lien over the same property. However, under both systems, the right to exercise a lien is likely not to be available to an aggrieved subcontractor against a contractor. This is legislated against under UAE law at Article 891 (advancing on the principle of privity of contract). Under South African law, a subcontractor will also not be able to rely on a debtor-creditor lien due to lack of a contractual nexus with the employer but may, in very rare instances, meet the requirements for an enrichment lien.

The requirements for the exercise of a lien under South African law and the Civil Code are largely similar. However, due to the binding nature of precedent under South African law and, the regularity in which this self-help remedy is used by aggrieved contractors, the nature of and, way in which a lien is exercised, has been developed and refined with reference to practical situations. This is in contrast to UAE law where, whilst previous judgments may certainly be persuasive, they are not binding on lower courts. This, coupled with the seeming unpopularity of this self-help remedy, has resulted in the possessory lien under the Civil Code remaining in a state which could benefit from a comparison with the more established South African institution.

Stellenbosch University https://scholar.sun.ac.za

5 6 Conclusion

The lawful exercise of a lien is a powerful mechanism to compel performance by a defaulting employer. A lien has the debilitating potential to bring an entire project to a standstill, leaving an employer with no choice but to pay or reimburse the contractor and it is no surprise that this remedy is used fairly regularly in South Africa. However, as indicated, whilst the remedy of a lien is legislated and available under UAE law, it is scarcely used in that jurisdiction.

There may be many pitfalls when engaging with this remedy and it is therefore essential that the concept of a lien is well developed and recognised in a legal system. Should this not be the case, and this is a shortcoming of the Red Book, it is imperative that the relevant construction contract includes clear contractual provisions to ensure certainty and the effective utilisation of this self-help remedy - a key tool and an effective self-help remedy for an unpaid contractor.

Stellenbosch University https://scholar.sun.ac.za

Chapter 6

Liquidated Damages – A Self-Help Remedy for the Employer

6 1 Introduction

The contractual mechanism entitling an employer to levy a specified monetary amount (liquidated damages)[497] against a contractor under a construction contract in the event of a breach of contract by the latter, is a powerful and effective means to compel timeous and complete performance by a contractor.

The obligation to pay such a predetermined and agreed to sum of money is imposed, by virtue of contract, on the contractor (usually) in instances where the contractor does not complete the works by a fixed date or where the works fail to meet pre-agreed performance criteria.

It is therefore recognised in the industry[498] that the primary motivation for the inclusion of liquidated damages clauses is to guarantee an innocent employer a set sum in the instance of breach by the contractor. This relieves the employer of the burden of proving before a court or arbitrator[499] the requirements of a damages claim flowing from a breach of the construction contract.[500] This ease with which the

---

497 For the purpose of this chapter and for ease of terminology, the term "liquidated damages" (a term commonly used, both correctly and incorrectly in industry) is used to collectively refer to both "penalties", i.e. an arbitrary amount specified to deter a breach and "liquidated and ascertained damages" (LADs), i.e. an amount intended to reflect the loss likely to be suffered as a result of a breach. The term liquidated damages, for the purposes of this chapter, should not be associated with the definition resorted to in many common law jurisdictions where "liquidated damages" is sometimes used interchangeably with LADs.

498 Ramsden *Mckenzie's Law of Building and Engineering Contracts and Arbitration* 184; Finsen *Building Contract* 143.

499 In most instances an employer will be contractually entitled to offset the liquidated damages from the sums owed to the contractor, thereby assisting greatly with cash flow of the employer. It may be highly detrimental for the business of an employer to wait for a decision by an arbitrator or the court before being entitled to such amounts.

500 "These damages may even exceed those which would otherwise be legally recoverable… [including] losses which would be irrecoverable due to the operation of… [legal] principles of remoteness or mitigation" - M Bell "Liquidated Damages and The Doctrine of Penalties: Rethinking the War on Terrorem" (26-05-2011) *Society of Construction Law* https://www.scl.org.uk/papers/liquidated-damages-and-doctrine-penalties-rethinking-war-terrorem (accessed 12 -10-2018). See also Finsen *Building Contract* 143 and *Suisse Atlantique Societe d'Armament SA v RNV Rotterdamsche Kolen Centrale* [1967] AC 361; C Chern "Remedies" in E Baker, B Mellors, S Chalmers & A Lavers (eds) *FIDIC Contracts Law and Practice* (2013) 8.1 8.39. For example, under South African law, should a contract not contain a liquidated damages clause, the innocent employer would be required to prove: a breach of

Stellenbosch University https://scholar.sun.ac.za

employer is entitled to claim liquidated damages will, in turn, most certainly serve as a compelling motivator for a contractor to perform.

In many instances, this contractually agreed remedy is attractive even to a contractor; informing it "that its liability is limited to the maximum of the fixed sums specified in the liquidated damages clause in the contract."[501] This enables a contractor to make provision for its potential exposure and to plan its risks accordingly,[502] serving a "desirable commercial purpose in that it allows parties to anticipate with maximal certainty the remedial consequences where the contract is breached."[503] It is also likely that the parties themselves will be best placed to quantify the prospective loss as opposed to a third party such as a court or an arbitrator.[504] However, even though a contractor is able to price this risk and plan accordingly, it will in all likelihood still not want to find itself facing the imposition of liquidated damages and will accordingly do its utmost to perform timeously.

It is important to distinguish between liquidated and ascertained damages ("LADs") as a "genuine pre-estimate" of the loss incurred and a so-called pure penalty because in some jurisdictions, the latter is simply, unlawful and legally unenforceable.[505] In the construction industry, there are many conflicting opinions on how to determine whether a predetermined amount constitutes a penalty or,

contract, a causal link between the breach and the loss suffered, the damage itself and that the damage is a foreseeable consequence of the breach of contract.

501 A Blomfield "Amending FIDIC Provisions on Delay Liquidated Damages: a Case Note on *J Murphy & Sons Ltd v Beckton Energy Ltd* [2016] EWHC 607 (TCC)" (03-06-2016) *King & Spalding* https://www.kslaw.com/blog-posts/amending-fidic-provisions-delay-liquidated-damages-case-note-j-murphy-sons-ltd-v-beckton-energy-ltd-2016-ewhc-607-tcc (accessed 16-10-17).

502 Chern "Remedies" in *FIDIC Contracts Law and Practice* 8.39. In some instances, a contractor may even build potential liquidated damages into the contract price tendered.

503 M Bell "Liquidated Damages and The Doctrine of Penalties: Rethinking the War on Terrorem *Society of Construction Law*. The author goes on to say that "it has been proposed that the benefits of LADs extend beyond the parties, with economic efficiency being broadly promoted through resources being out into up-front negotiation rather than litigation."

504 Blomfield "Amending FIDIC Provisions on Delay Liquidated Damages: a Case Note on *J Murphy & Sons Ltd v Beckton Energy Ltd* [2016] EWHC 607 (TCC)" *King & Spalding*. This assertion may however be countered by the argument that as a court will determine the damages retrospectively, the quantum reached will more closely reflect the actual damages suffered.

505 The law governing of the construction contract is of extreme importance to ascertain whether the application of penalty provisions is lawful.

Stellenbosch University https://scholar.sun.ac.za

whether it constitutes a genuine predetermined estimate of the loss. In the matter of *Pearl Assurance Co Ltd v Union Government*[506] it was held:

> "If the object of the forfeit is to compel performance by fear of the consequences, it is a penalty; if it is genuinely to pre- estimate damages it is not".

Penalties (as opposed to LADs) will therefore serve as an even greater motivator to compel specific performance by a contractor with "the primary purpose…[being] to incentivise a contractor to complete on time by way of a punitive financial consequence of failure."[507]

Therefore, whilst viewed as contentious in some jurisdictions,[508] liquidated damages clauses are highly effective as a contractor is forewarned, at the conclusion of the contract, of the potential consequences should it breach the contract.

In practice, at the conclusion of the construction contract, parties will agree that, in an instance of a failure to meet performance criteria or delayed completion or both, the employer will be entitled to levy liquidated damages against the contractor. Where liquidated damages provisions are applicable to delayed completion, liquidated damages are usually levied for the period between the agreed date for completion of the works and the actual date of completion of the works[509] - in summary:

> "provided that if the contract works are not completed by a fixed date the contractor shall be obliged to pay a certain sum to the employer as a forfeit, such sum depending on the period which elapses between the date fixed for completion and the date of actual completion."[510]

---

506 1933 AD 277. Note also the leading decisions of the Supreme Court of the United Kingdom – *Cavendish Square Holding BV v El Makdessi* [2015] UKSC 67 and *Parking Eye Ltd v Beavis* [2015] UKSC 67.

507 Grose *Construction Law in the United Arab Emirates and the Gulf* 138. It is also asserted in industry that "incentive payments" for early completion are more effective than liquidated damages provisions. See A McCormack "Is there a better alternative to liquidated damages on construction projects?" (06-05-2014) *Corrs Chambers Westgarth* https://www.corrs.com.au/thinking/insights/is-there-a-better-alternative-to-liquidated-damages-on-construction-projects/ (accessed 09-01-2019).

508 Grose *Construction Law in the United Arab Emirates and the Gulf* 138.

509 Ramsden *Mckenzie's Law of Building and Engineering Contracts and Arbitration* 184.

510 184.

Stellenbosch University https://scholar.sun.ac.za

A liquidated damages provision presupposes a breach by the contractor. Therefore, however in instances where the breach or delay is not attributable to the contractor and instead is attributable to the employer[511] or is outside of the control of both parties (for example where *force majeure* is the cause of the delay),[512] the employer will not be entitled to levy liquidated damages against the contractor.

Liquidated damages are generally applicable to the late completion of the works as a whole. However, some contracts also make provision for the imposition of liquidated damages to the late completion of pre-agreed sections or milestones and non-compliance with such provisions will result in liquidated damages being imposed for the particular section or milestone.[513] Where a liquidated damages provision relates to a failure to meet agreed performance criteria, parties usually specify a measurable performance target with an agreed minimum level of performance. Should the contractor fail to meet this minimum level of performance, the employer will be entitled to levy liquidated damages.[514]

The liquidated damages amount will be pre-agreed and (usually) formulaically determinable.[515] It is also common for parties to agree on a contractual cap[516]

---

511 Commonly known as the “prevention principle” – the employer cannot benefit from its own wrongdoing. See *Hansen and Schrader v Deare* (1883-1884) 3 EDC 36 46 where it was held: “As it was the defendant's own act which prevented the completion of the contract by the time stipulated, he cannot now take advantage of the penalty clause.” This was confirmed in *Kelly and Hingle's Trustees v Union Government (Minister of Public Works)* 1928 TPD 272. See Ramsden *Mckenzie’s Law of Building and Engineering Contracts and Arbitration* 181 and see *Ranch International Pipelines(Transvaal) (Pty) Ltd v LMG Construction* (City) (Pty) Ltd 1984 (3) SA 861 (W) and Van Huyssteen et al *Contract: General Principles* 358-359 on the notion of a creditor’s breach (*mora creditoris*) and its relevance in this regard.

512 In such instances, some contracts may make provision that the contractor is entitled to an extension of time but not cost. A discussion of “extension of time” is outside the scope of this dissertation.

513 Some construction contracts may also make provision for the employer to “take over” portions of the works prior to completion of the whole of the works. In such instances it is likely that the contract will include a provision that the amount of the liquidated damages is reduced pro rata. Note that this is distinct from sectional completion. See for example cl 10.2 of the Red Book.

514 A El Tawil *Liquidated Damages and Penalty in Construction Industry* Comparative Study Islamic University Gaza (2008) 4.

515 For example, x, amount per day or week. See Nienaber “Construction Contracts” *LAWSA* 9 para 49. Also see Grose *Construction Law in the United Arab Emirates and the Gulf* 138 who says: “The level of financial liability is calculated by reference to a pre-agreed formula, in which the principle variable is the duration of the delay.”

516 A MacCuish & N Newdigate “A Favourable Legislated Loophole for the Tardy Contractor” (20-10-2015) *Mondaq* http://www.mondaq.com/x/438786/Contract+Law/A+Favourable+Legislated+Loophole+For+The+Tardy+Contractor (accessed 16-10-2017).

Stellenbosch University https://scholar.sun.ac.za

(usually in the region of 10% of the contract price)[517] which such liquidated damages may not exceed. There also cannot be cumulative recovery of this contractually agreed amount and further damages suffered on account of the same breach and a "liquidated damages clause in a contract covers all the damage for non-completion or constitutes an exhaustive agreement as to the damages which are or are not to be payable…".[518]

Such provisions are triggered automatically upon breach of the relevant term by the contractor and, it is common under many construction contracts that no further juristic act[519] is required by the employer before it will be entitled to impose liquidated damages.

Liquidated damages provisions are therefore highly effective and commonly used. This chapter will look at how such clauses are viewed under South African law, the law of the UAE and the Red Book.

6 2 South African Law

Under South African law, the Conventional Penalties Act, 15 of 1962 recognises the imposition of both LADs and penalties as lawful and regulates the application of such clauses.[520]

Section 1 of Conventional Penalties Act says:

> "A stipulation, hereinafter referred to as a penalty stipulation, whereby it is provided that any person shall, in respect of an act or omission, in conflict with a contractual obligation, be liable to pay a sum of money or to deliver or to perform anything for the benefit of any other person, hereinafter referred to as a creditor, either by way of penalty or as liquidated damages, shall subject to the provisions of this Act, be capable of being enforced in any competent court."

A penalty provision within the statutory definition may contain a purely punitive element calculated to compel performance through fear. Prior to the enactment of the Conventional Penalties Act, South African law, under the influence of the

---

[517] See for example Dubai Court of Cassation 138/1994 dated 13 November 1994.

[518] Ramsden *Mckenzie's Law of Building and Engineering Contracts and Arbitration* 184.

[519] A MacCuish & N Newdigate "A Favourable Legislated Loophole for the Tardy Contractor" *Mondaq.*

[520] The reference to "liquidated damages" in this discussion of South African law includes both LADs and penalty stipulations: see n497.

Stellenbosch University https://scholar.sun.ac.za

English Common Law, declined to enforce provisions that were purely *in terrorem* of the debtor and recognised as enforceable only those where under the amount stipulated was a genuine pre-estimate of the loss likely to follow on the breach.[521] The promulgation of the Conventional Penalties Act saw this English Common Law importation being abolished in South Africa. The restoration of the Roman Dutch approach strictly speaking makes the distinction between penalties and LADs unnecessary.[522]

Section 1 requires that the liability of the contractor to pay the liquidated damages[523] must arise from a breach of a contractual obligation[524] and the Act also regulates the cumulation between the claim for the agreed upon amount and other remedies for breach that might be available. Where an employer accepts or is obliged to accept a defective or non-timeous performance, the stipulated amount will only be recoverable if it was expressly stipulated for the particular defect or delay.[525] In respect of a breach which is the subject of the provision, an employer will not be entitled to claim both liquidated damages and general damages.[526] Some construction contracts[527] provide the employer with an election to choose, at the conclusion of the contract, between penalties and damages. This is in accordance with the proviso in the final sentence of sec 2(1) of the Act.[528] Furthermore, an employer, despite the completion or cancellation of a construction contract, will still be entitled to levy and claim liquidated damages from the contractor[529] provided that the claim had already accrued to it. [530]

---

521 See JC De Wet "Memorandum Insake Straf en Verbeurdingsbedinge" in JJ Gauntlett (ed) *Opuscula Miscellanea* (1979) 63 and the essay on "Penalties and Liquidated Damages" in the same publication at 203; cf Van Huyssteen et al *Contract: General Principles* 423.

522 Loots *Construction Law and Related Issues* 398.

523 In the construction context the penalty will usually not consist of an undertaking to "deliver or to perform anything for the benefit of any other person".

524 Otherwise the stipulation will not be classified as a penalty - Ramsden *Mckenzie's Law of Building and Engineering Contracts and Arbitration* 186.

525 Section 2(2) of the Conventional Penalties Act.

526 See Section 2(1) of the Conventional Penalties Act; cf *Plumbago Financial Services (Pty) Ltd t/a Toshiba Rentals v Janap Joseph t/a Project Finance* 2008 (3) SA 47 (C) 23; See also Loots *Construction Law and Related Issues* 399.

527 E.g. the JBCC Principal Building Agreement.

528 See Van Huyssteen et al *Contract: General Principles* 428.

529 426.

530 In *Walker's Fruit Farm Ltd v Sumner* 1930 TPD 394, a general rule was established (and confirmed in many subsequent cases), that certain claims accruing prior to contract cancellation will survive, as independent causes of action, the cancellation of the contract, provided the claim had accrued, was due and enforceable and, importantly that the contract or performance

Stellenbosch University https://scholar.sun.ac.za

The employer's right to liquidated damages is an automatic result of the contractor's breach[531] and the employer will not need to perform any juristic act to exercise this entitlement other than to establish the prescribed breach on part of the contractor.[532]

Whether liquidated damages may be levied and deducted from sums owed to the contractor depends on the terms of the contract, and parties may agree that such deductions may only be made at the end of the contract or during the progress of the works.[533] In *Collins Submarine Pipelines Africa (Pty) Ltd v Durban City Council*[534] it was held that "penalties could be deducted during the progress of the work once the contractor had exceeded the time limit."[535]

The right to levy liquidated damages is easily available and enforceable by an employer and, is an effective means to encourage a defaulting contractor to perform properly and timeously. However, the employer's right is not completely unfettered. The contractor is provided with legislative protection under section 3 of the Conventional Penalties Act, which provides for a judicial discretion to reduce the amount stipulated in appropriate circumstances.[536] It is arguable that this approach maintains a superior balance between the interests of the parties and better respects the principle of freedom of contract than is the case in jurisdictions where purely penal stipulations are simply unenforceable.[537]

itself was divisible. Cancellation of the contract therefore operates *ex nunc* as opposed to *ex tunc*. See Van Huyssteen et al *Contract: General Principles* 392 – 393.

531 Finsen *Building Contract* 144.

532 Loots *Construction Law and Related Issues* 399.

533 The date of the prejudice is also not relevant – Loots *Construction Law and Related Issues* 399.

534 1968 (4) SA 763 (A).

535 Ramsden *Mckenzie's Law of Building and Engineering Contracts and Arbitration* 187. See also Nienaber "Construction Contracts" *LAWSA* 9 para 50.

536 Ramsden *Mckenzie's Law of Building and Engineering Contracts and Arbitration* 186. The courts will however, as far as possible, continue to respect and adhere to the maxim of *pacta sunt servanda*. It is debatable if this "judicial discretion" extends to arbitrators – Binnington "The Application of Penalties (but which end of the donkey gets the carrot?)" *BCA*.

537 See also Ramsden *Mckenzie's Law of Building and Engineering Contracts and Arbitration* 185 and on the approach before the introduction of the Conventional Penalties Act, see *Pearl Assurance Co Ltd v Union Government 1933; Pearl Assurance Co Ltd v Union Government* 1934 AD 560; *Durban Corporation v McNeil* 1940 AD 66, T*obacco Manufacturers Committee v Green & Sons* 1953 (3) SA 480 (A). See also *Kelly and Hingle's Trustees v Union Government (Minister of Public Works)* 1928 TPD 284 where Feetham J provided four guidelines to be applied by a court when considering the application of liquidated damages clauses in construction contracts. Whilst most helpful, it is not entirely clear if all of these guidelines have survived the promulgation of the Conventional Penalties Act.

Stellenbosch University https://scholar.sun.ac.za

Section 3 of the Conventional Penalties Act is to the effect that:

> "If upon hearing of a claim for a penalty, it appears to the court that such penalty is out of proportion to the prejudice suffered by the creditor by reason of the act or omission in respect of which the penalty was stipulated, the court may reduce the penalty to such an extent as it may consider equitable in the circumstances: Provided that in determining the extent of such prejudice the court shall take into consideration not only the creditor's proprietary interest, but every other rightful interest which may be affected by the act or omission in question."

When looking to apply section 3, a court will look to determine whether a liquidated damages provision exists under the contract[538] and, whether the liquidated damages are disproportionate to the employer's prejudice - justifying a reduction.[539] The court will then assess the reduction.[540] In *Plumbago Financial Services (Pty) Ltd t/a Toshiba Rentals v Janap Joseph t/a Project Finance*[541] ("*Plumbago Financial Services")* it was held that:

> "The best method of determining this is to compare what the plaintiff's position would have been had the defendant not defaulted in the contract as opposed to what the plaintiff's position would be should it obtain judgment in the full sum sought."

It should be noted, however, that the Conventional Penalties Act does not require a comparison between the stipulated amount and the actual patrimonial loss suffered by the employer: the focus is on the prejudice suffered by the latter. This requires a regard to "every other rightful interest" of the employer and thus goes much wider than an enquiry into the patrimonial loss occasioned by the breach.[542] It was accordingly emphasised in *Van Staden v Central South African Land and Mines*[543] that the assessment must be subjective in nature, giving regard not only to the pecuniary interests of the employer, but also to circumstances where there

---

538 Note again Section 1, which requires that liability of the contractor to pay the liquidated damage must arise from breach of a contractual obligation.

539 *Plumbago Financial Services (Pty) Ltd t/a Toshiba Rentals v Janap Joseph t/a Project Finance* 2008 (3) SA 47 (C) 23.

540 *Plumbago Financial Services (Pty) Ltd t/ Toshiba Rentals v Janap Joseph t/a Project Finance* 2008 (3) SA 47 (C) 30. Note the Conventional Penalties Act does not compare damages suffered by the employer, but the prejudice suffered – this is much wider than damages. Loots *Construction Law and Related Issues* 399. See also Binnington "The Application of Penalties (but which end of the donkey gets the carrot?)" *BCA*.

541 2008 (3) SA 47 (C) 31.

542 Loots *Construction Law and Related Issues* 399. See also Binnington "The Application of Penalties (but which end of the donkey gets the carrot?)" *BCA*.

543 1969 (4) SA 349 (W) 353. See also Van Huyssteen et al *Contract: General Principles* 427.

Stellenbosch University https://scholar.sun.ac.za

has been no financial loss, but other legitimate and protectible interests of the employer are at stake:

> "Everything that can reasonably be considered to harm or hurt, or be calculated to harm or hurt a creditor in his property his person, his reputation, his work, his activities, his convenience, his mind, or in any way whatever interferes with his rightful interests as a result of the act or omission of the debtor, must be brought to the notice of the Court, be taken into account by the Court in deciding whether the penalty is, in terms of section 3 of the Conventional Penalties Act, 15 of 1962, out of proportion to the prejudice suffered by the creditor as a result of the act or omission of the debtor…The test as to all this is, in my view, a subjective test of prejudice…No doubt in most cases the monetary aspect will play an important role, indeed the paramount role in the consideration of the matter by the Court, but one can conceive of circumstances where a seller may sustain no pecuniary loss arising directly out of the breach, yet he may nevertheless be seriously prejudiced... For example… It is very usual in building contracts for penalty provisions to be stipulated for the timeous delivery of a completed building, yet it may well be that the stipulator suffers no monetary damage by a late delivery"

It is important to note that the burden of proof will lie with the contractor to prove that the employer did not suffer any prejudice[544] or "that the penalty is out of proportion to the prejudice suffered by the [employer]."[545] In *Steinberg v Lazard*[546] it was held:

> "There is absolutely no need for the creditor to allege prejudice in claiming a penalty. The onus being on the debtor it is for the debtor to allege and prove its absence…"

This was confirmed in *Plumbago Financial Services*[547] and it was further held in this judgment that, a court is empowered itself to raise and consider the excessiveness of the liquidated damages, despite the issue not being raised in the pleadings:[548]

> "There is some debate as to whether a court has the power to act of its own accord in opposed proceedings in raising the question of whether an excessive penalty has been claimed...[a] flexible approach was advocated in *Courtis Rutherford & Sons CC & others v Sasfin (Pty) Ltd*, a Full Bench decision of this Division. Van Zyl J observed that it is, and remains, the court's primary function to ensure that justice is done on the basis of what is just, fair and reasonable under all circumstances. By implication, he expressed approval of a court

---

544 *Smit v Bester* 1977 (4) SA 937 (A).

545 Ramsden *Mckenzie's Law of Building and Engineering Contracts and Arbitration* 186.

546 2006 (5) SA 42 (SCA). See also *Citibank NA, South Africa Branch v Paul NO and Another* 2003 (4) SA 180 (T).

547 2008 (3) SA 47 (C). See also Ramsden *Mckenzie's Law of Building and Engineering Contracts and Arbitration* 187.

548 *Plumbago Financial Services (Pty) Ltd t/a Toshiba Rentals v Janap Joseph t/a Project Finance* 2008 (3) SA 47 (C) 52-53. See also Van Huyssteen et al *Contract: General Principles* 427. The authors go on to say that the discretion of the court is in fact a power coupled with a duty.

dealing with the question of an excessive penalty even where that was not formally pleaded, subject to it being fully canvassed in evidence and argument."

A defaulting contractor is therefore able to rely on section 3 of the Conventional Penalties Act, even if not formally pleaded, with a court being authorised to raise the question of excessive liquidated damages. Section 3 is therefore a significant tool in avoiding unduly harsh punitive stipulations. This is, however, tempered by the high burden of proof on the defaulting contractor in order for it to be successful under this section,[549] and the general reluctance by the courts to interfere with what parties have agreed, continuing to respect and adhering to the maxim of *pacta sunt servanda.*[550]

Liquidated damages stipulations are therefore recognised and respected under South African law. The ease in which an innocent employer can impose liquidated damages (especially in instances where such liquidated damages stipulations are punitive), and the high threshold required by the contractor to reduce penalty stipulations are key motivators for a defaulting contractor to perform not only specifically but timeously as well. Therefore, it can be said that under South African law, liquidated damages stipulations (especially those which contain a penal element) are an effective motivator, available to an innocent employer, to compel timeous specific performance by a defaulting contractor.[551]

6 3 UAE Law

The Civil Code, somewhat indirectly, recognises payment of a contractually agreed compensation as a means to encourage specific performance by a defaulting contractor. Article 386 of the Civil Code says:

---

549 There is only one reported judgment (*Afriscan Construction (Pty) Ltd v Umkhanyakude District Municipality & another* [2005] JOL 14365 (D)) in which a contractor has been successful in the reduction of a penalty under section 3 in a construction context. This indicates the difficulty contractors may face when seeking to rely on this section. See Binnington "The Application of Penalties (but which end of the donkey gets the carrot?)" *BCA*.

550 Finsen *Building Contract* 144.

551 See an industry example of this viewpoint in MJ Maritz & S Tshikila "The Extent of Enforcement of The Penalty Clause on Public Sector Construction Contracts in South Africa" http://www.irbnet.de/daten/iconda/CIB_DC24516.pdf *University of Pretoria* (accessed 14-10-2018) where a study was performed which assessed the extent of enforcement of penalties by Public Sector clients. In the study, one of the questions asked was whether it was believed that penalty/LAD provisions are still relevant in construction contracts. An overwhelming majority (just under 80%) indicated that penalty provision remain relevant and are "a useful tool to dissuade the contractor from completing the works later than the approved date."

Stellenbosch University https://scholar.sun.ac.za

> "If it is impossible for an obligor to give specific performance of an obligation, he shall be ordered to pay compensation for non-performance of his obligation…The same shall apply in the event that the obligor defaults in the performance of his obligation."

Should a contractor fail to perform, the employer will be entitled to claim damages as a consequence of this non-performance. Article 390(1) goes on to provide that contracting parties may fix this compensation in advance by agreement.[552] This Article says:

> "The contracting parties may fix the amount of compensation in advance by making a provision therefor in the contract or in a subsequent agreement, subject to the provisions of the law."

Therefore, in principle, Article 390(1) recognises the validity of "liquidated damages" clauses,[553] and these are common in many construction contracts.[554] Courts generally recognise such clauses with an entitlement to compensation being dependent on the following:[555]

i. The breach of contract was committed by a party who agreed to be bound by the liquidated damages clause;[556]

ii. Losses were actually incurred by the innocent employer endeavouring to rely on the liquidated damage clause[557] and, the innocent employer must be able

---

552 If the agreement is subsequently terminated, an employer will lose this contractual remedy.

553 See also Whelan *UAE Civil Code and Ministry of Justice Commentary* 2:0577 which says: "Entitlement to compensation is a prerequisite for the application of this Article. If compensation is not payable, the provisions of this Article do not come into operation. If compensation is due and payable and the amount determined by the parties is compatible with the damage sustained, then well and good."

554 There is an indication that the application of liquidated damages in respect of "administrative Contracts" (contracts that serve the public interest) may differ. This is because the purpose of such contracts is to deliver "public or non-generating revenue works". See Grose *Construction Law in the United Arab Emirates and the Gulf* 143. Liquidated damages in the context of such administrative contracts is outside the scope of this thesis and the discussion pertains only to commercial entities.

555 N Bremer "Liquidated Damages under the Law of the United Arab Emirates and its interpretation by the UAE Courts" (21-11-2015) *Research Gate* https://www.researchgate.net/publication/284279837_Liquidated_Damages_under_the_Law_of_the_United_Arab_Emirates_and_its_Interpretation_by_UAE_Courts (accessed 16-10-2017) 206. See also F Attia "Liquidated Damages – The Bigger Picture" (05-03-2012) *Law Update* http://www.tamimi.com/en/magazine/law-update/section-6/march-5/liquidated-damages-the-bigger-picture.html (accessed 16-10-2017).

556 Bremer "Liquidated Damages under the Law of the United Arab Emirates and its interpretation by the UAE Courts" *Research Gate* 206. See also Union Supreme Court No. 610 of JY 20 & 7 of JY 21.

557 Bremer "Liquidated Damages under the Law of the United Arab Emirates and its interpretation by the UAE Courts" *Research Gate* 206. The author goes on to refer to a judgment given by the Supreme Court Petition No. 26 of Judicial Year 24 dated 1 June 2004 where a main

Stellenbosch University https://scholar.sun.ac.za

to prove damage was actually incurred;[558]

iii. A causative connection is present between the breach and the loss suffered by the employer.[559]

However, arguments do exist that the recognition of liquidated damages clauses is in contravention to Islamic law whereby compensation for damages should only arguably be given where the damage is able to be quantified, sufficiently substantiated and only in the amount suffered. A contractual obligation to compensate the employer in an amount which is potentially in excess of the damage suffered gives rise to uncertainty and may accordingly infringe on the principle of *gharar*.[560]

As parties determine the amount of compensation payable at the commencement of the *muqawala*, i.e. in advance and prior to damage being incurred, it is unlikely that the agreed compensation will match the loss sustained, which may result in a party receiving more than what was suffered. This uncertainty and the potential over or under payment is in contravention of the principle of *gharar*.

---

contractor tried to impose liquidated damages on a subcontractor under a subcontract despite the main contractor not having suffered any loss as a result of the subcontractor's breach. This was because the employer had not imposed liquidated damages on the main contractor under the corresponding "main contract". The court held that proving fault on the part of the subcontractor was not sufficient - the main contractor had to have suffered loss as well. In the context and discussion of subcontractors, see also Grose *Construction Law in the United Arab Emirates and the Gulf* 141 who is of the opinion that this should not be a sufficient subcontractor defence to the imposition of liquidated damages and that subcontractor liability should be assessed independently to the main contractor's liability under the main contract. See also Union Supreme Court 103/Judicial Year 24 21 March 2004, Union Supreme Court 414/Judicial Year 21 27 March 2001, M Marican *The Effect of Article 390(2) of the UAE Civil Code on Liquidated Damages Claims in the UAE Construction Industry* MSc BUiD (2014) 21 and A Ibrahim & J Mullen "Liquidated Damages under UAE and UK law: a comparison." (09-10-2013) *Fenwick & Elliott Annual Review* https://www.fenwickelliott.com/research-insight/annual-review/2013/liquidated-damages-uae-uk-law-comparison (accessed 16-10-2017).

558 Bremer "Liquidated Damages under the Law of the United Arab Emirates and its interpretation by the UAE Courts" *Research Gate* 205. Bremer notes that the employer need not be able to quantify the loss (unless the employer is seeking to rely on Article 390(2).

559 Bremer "Liquidated Damages under the Law of the United Arab Emirates and its interpretation by the UAE Courts" *Research Gate* 207. See also Union Supreme Court 218/Judicial Year 25 and Union Supreme Court 26/Judicial Year 24 dated 1 June 2004.

560 Bremer "Liquidated Damages under the Law of the United Arab Emirates and its interpretation by the UAE Courts" *Research Gate* 200. The author continues at 204 to define the principle of *gharar*: "The Islamic principle of *gharar* – frequently translated as 'uncertainty' or 'deceptive uncertainty' – prohibits the conclusion of agreements that compromise the risk of one party benefitting or sustains [sustaining] losses due to circumstances unknown at the time of the conclusion of the agreement. This principle is commonly associated with the prohibition of gambling and speculation has implications for liquidated damage clauses".

Stellenbosch University https://scholar.sun.ac.za

Nonetheless, the importance and commercial need for liquidated damages clauses, especially in *muqawala* contracts, is widely acknowledged in the UAE.[561] Article 390(2) of the Civil Code serves to alleviate this discrepancy by striking a compromise between Islamic jurisprudence and market need.[562]

Under Article 390(2)[563] of the Civil Code, the court is provided with a wide discretionary power to vary such provisions.[564] This is a mandatory provision in the Civil Code so that parties may not agree that it is not applicable to their agreement.[565] Article 390(2) says:

> "The judge may in all cases, upon the application of either of the party, vary such agreement so as to make compensation equal to the loss and, any agreement to the contrary shall be void."

This was confirmed in a Federal Supreme Court decision[566] where it was held:

> "It is established that delay fines in construction contracts are a financial penalty that project owners resort to when the contractor is in breach of its obligations in executing the work on time. However, these penalties are subject to control by law to protect a party from any unjustified actions and from any contraventions of the law."

For many, this provision infringes on the sanctity of contract,[567] with a court being entitled to vary what parties have agreed. However, this Article is justified by the need to achieve a balance between industry demands and Islamic jurisprudence.

---

561 Bremer "Liquidated Damages under the Law of the United Arab Emirates and its interpretation by the UAE Courts" *Research Gate* 201.

562 Bremer "Liquidated Damages under the Law of the United Arab Emirates and its interpretation by the UAE Courts" *Research Gate* 201 - see further the discussion on page 204. See also Whelan *UAE Civil Code and Ministry of Justice Commentary* 2:0577.

563 For similar provisions see Article 224 of the Egyptian Civil Code; Article 364 of the Jordanian Civil Code; Article 266 of the Qatari Civil Code; Article 226 of the Bahrain Civil Code; Article 303 of the Kuwait Civil Code; Article 267 of the Oman Civil Code. It is also asserted that this Article is also applicable to liability caps.

564 Under common law jurisdictions, a court will not be empowered to vary a stipulation which is penal in nature to reflect the actual loss suffered, but only be empowered to declare such a punitive stipulation void. Grose *Construction Law in the United Arab Emirates and the Gulf* 139. Note also that this Article is not applicable in instances when the agreement has been terminated or has come to an end and to tortious claims - see Marican *The Effect of Article 390(2) of the UAE Civil Code* 20; Whelan *UAE Civil Code and Ministry of Justice Commentary* 2:0577.

565 Grose *Construction Law in the United Arab Emirates and the Gulf* 139. According to Article 31 of the Civil Code a mandatory provision of law will take precedence over a contractual provision.

566 595/18 dated 26 April 1998.

567 Bremer "Liquidated Damages under the Law of the United Arab Emirates and its interpretation

Stellenbosch University https://scholar.sun.ac.za

It is important to note that Article 390(2) makes provision for "either party" to approach the court for the adjustment of compensation.[568] An innocent employer is accordingly entitled to approach the courts for an upward adjustment of the compensation originally agreed in the contract to reflect damages actually sustained.[569] This is a further incentive for a defaulting contractor to comply with the contract.

It is presumed that the liquidated damages clause reflects the actual amount of damage suffered.[570] Therefore, a party who wishes to challenge a liquidated damages clause under Article 390(2) bears the burden of proving that the specified amount does not reflect the true loss sustained.[571] Once a party has discharged this burden, a court will investigate and determine the damages actually incurred.[572] This approach is supported by Article 48(1) of the Evidence Law, which on interpretation only requires that in order to rebut an assumption, a party need not

by the UAE Courts" *Research Gate* 204. Article 126 of the Civil Code upholds the freedom to contract.

568 Whether a court is entitled to raise and apply Article 390(2) without it being raised by a party in the pleadings is uncertain. Some writers suggest that a court cannot intervene without application by one of the parties. See H Al Mulla "Damages and Contract in the UAE" (12-03-2010) *The In House Lawyer* http://www.inhouselawyer.co.uk/index.php/legal-briefing/damages-and-contracts-in-the-uae/ (accessed 16-10-2017). Whether an arbitrator is entitled to invoke the provisions of Article 390(2) or whether such powers are limited to the judiciary also awaits clarification.

569 Grose *Construction Law in the United Arab Emirates and the Gulf* 142. Furthermore, this strikes at one of the key motivators as to why a contractor would agree to liquidated damages – namely to protect the contractor from unliquidated damages. Ibrahim & Mullen "Liquidated Damages under UAE and UK law: a comparison" *Fenwick & Elliott Annual Review*. In addition, some writers assert that liquidated damages and general 'compensatory damages' are not viewed by UAE law as mutually exclusive and an employer may be successful in bringing a claim for liquidated damages together with a further claim for loss actually suffered. E Rankin "How the law of liquidated damages can be applied in the local jurisdiction" (09-06-2007) *Arabian Business* http://www.arabianbusiness.com/how-law-of-liquidated-damages-can-be-applied-in-local-jurisdiction-143768.html (accessed 16-10-2017).

570 Bremer "Liquidated Damages under the Law of the United Arab Emirates and its interpretation by the UAE Courts" *Research Gate* 209. See also F Attia "Liquidated Damages – The Bigger Picture" *Law Update*.

571 Marican *The Effect of Article 390(2) of the UAE Civil Code* 25.

572 Bremer "Liquidated Damages under the Law of the United Arab Emirates and its interpretation by the UAE Courts" *Research Gate* 210. Also see Grose *Construction Law in the United Arab Emirates and the Gulf* 141: "A party seeking to recover delay damages in the Federal Supreme Court must be prepared to adduce evidence not only of delay for which no entitlement to an extension of time exists but also fault and amount of loss. Although the assessment of damages for this purpose is a discretionary matter for the Court of Merits the judgment should set out the computation of the damages, including the individual heads of loss." See also Marican *The Effect of Article 390(2) of the UAE Civil Code* 32.

Stellenbosch University https://scholar.sun.ac.za

provide evidence which proves circumstances specific to the case at hand but will need only to provide evidence contradicting the assumption.[573]

Once the burden is discharged, a court will be empowered to vary the compensation as it deems fit and such determination is within its sole discretion. The Supreme Court[574] held:

> "[t]he assessment of damage and the evaluation of the underlying circumstances when assessing the compensation due are matters of fact within the sole discretion of the trial court."

Unfortunately, there is inconsistency in judicial decisions and in some instances, the courts have allowed for damages, which were not equal to, or in excess of, the loss actually incurred (even allowing, on occasion, for the inclusion of a punitive element).[575] However, this does not detract (in fact it may even further encourage) a defaulting contractor to tender specific performance properly and timeously to avoid the imposition of liquidated damages.

From a contractor's perspective, Article 390(2), by allowing for the agreed amount of compensation to be varied through judicial intervention, removes the limited benefits of agreeing to liquidated damages clauses; any guarantee and reassurance that liquidated damages are limited to a fixed amount falls away. Whilst in some instances, Article 390(2) may provide legislative protection through judicial intervention, it may also work against a defaulting contractor by enabling an innocent employer to rely on this clause to increase the liquidated damages amount to reflect the loss actually sustained. In order for this to happen, an employer needs only to discharge the (relatively low) burden of proof, and a defaulting contractor will then fall into the hands of the courts to determine the compensation amount.

---

573 Bremer "Liquidated Damages under the Law of the United Arab Emirates and its interpretation by the UAE Courts" *Research Gate* 210.

574 36/Judicial Year 21.

575 Bremer "Liquidated Damages under the Law of the United Arab Emirates and its interpretation by the UAE Courts" *Research Gate* 201. It must be borne in mind that the concept of binding precedent does not exist under UAE law. See also Marican *The Effect of Article 390(2) of the UAE Civil Code* 14 and M Heywood M & C Holmes "How Fixed are your Liquidated Damages" (01-2015) *InSite – Construction Issues for the Middle East Issue No. 1* https://www.pinsentmasons.com/PDF/Insite-Construction-Middle-East-Newsletter-Issue-1.pdf (accessed 16-10-2017) - "The literal translation of "liquidated damages" in Arabic is "fines"…the UAE [Civil Code] allows parties to agree any level of future liquidated damages (or "fines"), even if the amount is arbitrary or excessive".

Stellenbosch University https://scholar.sun.ac.za

The Abu Dhabi Court of Cassation[576] held:

> "Article 390 of the Civil Code shows…that a stipulation for a penalty clause renders the assessment of harm a matter for the contracting parties, and the obligee does not have to prove it. Rather, the obligor has the burden of proving that it did not take place. There is a presumption that the assessment of compensation agreed is commensurate with the harm suffered by the obligee, and the judge must abide by that clause and give effect to it unless the obligor proves that the agreed compensation is excessive or that the obligee did not suffer any harm at all."

Therefore, liquidated damages clauses are recognised by the judiciary in the UAE and, any contractor would be well advised to properly and timeously tender specific performance.

6 4 The Red Book

The Red Book does not make provision for the imposition of liquidated damages in instances where the works fail to meet pre-agreed performance criteria. Should parties wish to make liquidated damages applicable to performance criteria, they would need to modify the conditions of contract. A failure by a contractor to comply with the provisions of clause 8.2 of the Red Book regarding the Time for Completion,[577] however, entitles the employer to claim delay damages under clause 8.7,[578] and albeit somewhat indirectly, this provides a recourse to liquidated damages for this kind of breach.

Clause 8.7 of the Red Book says:

> "If the Contractor fails to comply with Sub-Clause 8.2 [*Time for Completion*], the Contractor shall subject to Sub-Clause 2.5 [*Employer's Claims*] pay delay damages to the Employer for this default. These delay damages shall be the sum stated in the Appendix to Tender, which shall be paid for every day which shall elapse between the relevant Time for Completion and the date stated in the Taking-Over Certificate. However, the total amount due under this Sub-

576 941/2009 dated 29 September 2009 See also Union Supreme Court 370/Judicial Year 20 2 May 2000.

577 "The Contractor shall complete the whole of the Works, and each Section (if any) within the Time for Completion for the Works or Section (as the case may be), including…". Many authors assert that the remedy of delay damages is also applicable to the breach of Cl 8.1 which requires the contractor to proceed with "due expedition and without delay." See Grose *Construction Law in the United Arab Emirates and the Gulf* 328.

578 The contractor's entitlement for adjustments for changes in cost under cl 13.8 is also unfavourably impacted should the contractor fail to complete by the agreed time for completion.

Stellenbosch University https://scholar.sun.ac.za

> Clause shall not exceed the maximum amount of delay damages (if any) stated in the Appendix to Tender.
>
> These delay damages shall be the only damages due from the Contractor for such default, other than in the event of termination under Sub-Clause 15.2 [Termination by the Employer] prior to the completion of the Works. These damages shall not relieve the Contractor from his obligation to complete the Works, or from any other duties, obligations or responsibilities which he may have under the Contract."

The term "delay damages" is undefined in the definitions section of the Red Book but, such delay damages are easily identifiable by the sum[579] inserted by the parties into the Appendix to Tender. The quantum of such an amount[580] is a vital consideration both under law and for contractor's level of risk exposure.[581] Given the ordinary and generally accepted interpretation of the term "damages", some academics are of the view that the term "delay damages" in the Red Book should mean that the reasonable estimate of the actual losses which may be incurred by the employer should be reflected as the figure assigned for delay damages.[582]

Delay damages are levied daily from the contractually stipulated time for completion until the date of actual completion and, parties are entitled to cap the maximum amount of delay damages in the Appendix to the Tender. [583]

Uncertainty exists whether an employer is simply entitled to deduct delay damages from what is due to the contractor or whether an employer is obliged contractually to follow the procedure set out in the Red Book for doing so.[584] Many academics

579 This may also be a percentage of the contract price.

580 Chern "Remedies" in *FIDIC Contracts Law and Practice* 8.47 makes reference to the FIDIC Guide which suggests that the governing law of the relevant contract may require this sum to be a reasonable estimate of the employer's losses, and that any quantification which is penal in nature may be regarded as unlawful. This "reasonable estimate" may also include finance charges, supervision and in some instances, an element of profit.

581 Chern "Remedies" in *FIDIC Contracts Law and Practice* 8.45.

582 Barr & Grutters *FIDIC User's Guide* 176. In a previous version of the FIDIC Red Book (1987), "liquidated damages" were particularly provided for. Where the governing law of the contract allows for penalties and, should the parties wish to include penalty provisions in their contract, parties should amend cl 8.7 to ensure that interpretation of the term "delay damages" does not limit compensation to a pre-determined LAD amount and accordingly allows for penalties.

583 If the parties do not limit the maximum amount of delay damages, then there will be no cap and the contractor will remain liable until it meets its obligations under cl 8.2. However, this liability is not in excess of the overall limitation of liability which is set out in cl 17.6 - see Chern "Remedies" in *FIDIC Contracts Law and Practice* 8.51.

584 Under cl 2.5 (Employers Claims), the employer is obliged to give notice to the contractor of its intention to deduct delay damages from the contractor. The engineer will then make a determination under cl 3.5 (Determinations) agreeing to or determining these amounts. Only

maintain that an employer is obliged procedurally to comply with clause 2.5 and 3.5.[585] In the UK case of *J Murphy & Sons Ltd v Beckton Energy Ltd,*[586] however, the court held:

> "When interpreting a written contract, it was necessary to focus on the meaning of the relevant words in their documentary, factual and commercial context. Clause 8.7[587] set out a self-contained regime for the trigger and payment of delay damages but did not suggest that there was an additional regime, such as that contained in cll.2.5 and 3.5, to be imported…Thus, on a proper construction of the contract, the right to liquidated damages under cl.8.7 was not subject to the mechanism set out in cl.2.5 and 3.5."

It is also contended that the contractual requirement under clause 3.5 for the engineer to determine the amount payable by the employer to the contractor detracts from the principle that delay damages are a "pre- agreed amount". To so hold would also defeat the purpose of certainty regarding the quantum of the delay damages and, as there is no fixed period for the engineer to make its determination, there may be an unprecedented delay.[588]

There is slight uncertainty in the industry regarding the date on which the employer is entitled to claim delay damages. This is because under the wording of clause 8.7 an argument exists that such delay damages are only claimable from the date on which the taking over certificate[589] was issued. However, a counter (and more plausible) argument is that clause 8.7 indicates the time period over which delay damages are to be calculated and is not intended to indicate the time when the employer's entitlement to claim payment of such delay damages arises.[590] Given the above uncertainty, it is advisable that parties (carefully) amend the terms of the Red Book depending on their assessment of the circumstances.

---

once the engineer has given a determination in favour of the employer will the employer be entitled to deduct these amounts. Clarity surrounding the procedure has arguably been included in the 2017 publication of the Red Book. See cl 8.8 [Delay Damages] and cl 20.2 [Claims for Payment and/or EoT] - particularly cl 20.2.7.

585 See Grose *Construction Law in the United Arab Emirates and the Gulf* 330 who contends that the failure to do so might trigger the contractor's right to suspend work under cl 16.1 or terminate the contract under cl 16.2 [Termination by Contractor].

586 [2016] EWHC 607 1.

587 Note in this case, cl 8.7 had been slightly amended by the parties.

588 See Blomfield "Amending FIDIC Provisions on Delay Liquidated Damages: a Case Note on *J Murphy & Sons Ltd v Beckton Energy Ltd* [2016] EWHC 607 (TCC)" *King & Spalding.*

589 Cl 10 – Employer's Taking Over.

590 Chern "Remedies" in *FIDIC Contracts Law and Practice* 8.55.

Stellenbosch University https://scholar.sun.ac.za

It is also important to note that, unless the employer terminates the contract,[591] delay damages are the only damages[592] due from the contractor to the employer for this particular default.

The possibility to recover Delay Damages under clause 8.7 is an important remedy to an innocent employer who wishes to compel (timeous) specific performance from a defaulting contractor; in the first instance, it enables the employer to a set sum of money without needing to prove the amount and, in instances where the amount contains a punitive element, the contractor will be compelled to perform in *terrorem*. However, the parties must give due regard to the governing law of the Red Book,[593] and should the governing law prohibit the imposition of purely penal provisions, the parties must be careful to ensure that the delay damage is a genuine pre-estimate of the loss. Should they fail to do so, an employer may find its valuable remedy thwarted and rendered void by the governing law.

6 5 Comparison

Liquidated damages clauses are afforded recognition under South African law (section 1 of the Conventional Penalties Act) and the law of the UAE (Article 386 read with Article 390 of the Civil Code) and provided for in clause 8.7 of the Red Book.

An entitlement to liquidated damages is founded in the breach of an obligation by the contractor. In addition to this breach, under the Civil Code, courts only recognise the validity of these clauses where the contractor is legally responsible for the breach, loss was actually sustained by the employer and, there is a causal link between the breach and the losses sustained. The consideration of these further requirements, in addition to the agreement reached by the parties is arguably an infringement of the right of freedom of contract. However, as UAE law is founded in Sharia' law, such liquidated damages clauses may be seen to infringe on the

591 See Grose *Construction Law in the United Arab Emirates and the Gulf* 328 where the different interpretations of this section of cl 8.7 are discussed.

592 This restriction is only in relation to damages and not in relation to other remedies which may be available to the contractor under law. Chern "Remedies" in *FIDIC Contracts Law and Practice* 8.52.

593 Cl 1.4 "The Contract shall be governed by the law of the country (or other jurisdiction) stated in the Appendix to Tender.

Stellenbosch University https://scholar.sun.ac.za

principle of *gharar.* The inclusion of these requirements, in addition to Article 390(2) of the Civil Code, serves as a compromise between market demands and Islamic jurisprudence.

Article 390(2) of the Civil Code and section 3 of the Conventional Penalties Act are comparable, providing the courts with the power to vary the liquidated damages amount agreed to between the parties. This is a mandatory provision under UAE law which may not be contracted out of by the parties and similar protections exist under South African law.[594]

Under South African law a court can exercise this power on its own volition – this is questionable under UAE law, with some academics maintaining the view that a court may only exercise this power upon application by one of the parties. The ability of a court to exercise this power without an application by one of the parties, arguably serves to protect a contractor in instances where such protection is necessary. However, in the alternative, it is arguable that such interference is too paternalistic and by doing so, a court is acting *ultra vires*. It also remains subject to debate, in both systems, whether an arbitrator is also afforded this power.

A key distinguishing feature between Article 390 of the Civil Code and Section 3 of the Conventional Penalties Act is the power of the court, under UAE law, upon application of the employer to vary the liquidated damages amount upwards, to make the compensation equal to the loss. This is contrast to South African law where a judge may only make an adjustment downwards, reducing the liquidated damages amount to an amount the court considers equitable in the circumstances.

Whilst the ability to adjust liquidated damages upwards is viewed with scepticism, there may be merit in affording both an employer and a contractor judicial protection

[594] Under South African law, parties are precluded from contracting out of a protection in anticipation of a breach which has not yet occurred. However, once the breach has occurred, the parties may agree to exclude reliance on the protection and the Conventional Penalties Act does not expressly prohibit the waiver of rights. See *Portwig v Deputation Street Investments (Pty) Ltd* 1985 (1) SA 83 (D) where it was held that the aim of the Conventional Penalties Act to ensure fairness would not be defeated nor would public policy be offended, in the absence of duress, mistake, fraud or undue influence, if a party agreed after the breach, to waive its right to claim protection under the Conventional Penalties Act.

Stellenbosch University https://scholar.sun.ac.za

in this regard. In practice, parties may misjudge and inaccurately quantify potential liquidated damages. Should the parties estimate the amount to be too high, a contractor is provided with adequate protection to have the amount adjusted downwards. There is no reason why this protection should not extend to an employer where parties estimate the amount too low. In such instances, an employer should be afforded equal protection under the law and, should have the right to adjust the liquidated damages amount upwards.

Therefore, the advantage of pre-agreeing an amount which includes a penal element exceeding prejudice actually suffered by the employer, may be ultimately negated. This makes the burden of proof of utmost importance. The burden of proof under UAE law lies with the party alleging that the liquidated damages amount does not reflect the harm suffered. This is in contrast to South African law, where the burden of proof will lie with the contractor to prove that the employer did not suffer any prejudice.[595]

Parties under both UAE law and South African law, may agree the computation of the liquidated damages amount and the Red Book makes provision at the commencement of the construction contract for parties to agree (usually formulaically) the amount of delay damages.[596] This is usually also subject to an agreed cap on the maximum amount of delay damages imposable. This methodology and, especially an agreement on a capped amount, serves to control and limit the exposure of the contractor. This may avoid allegations that the liquidated damages amount is unreasonable or out of proportion to the prejudice suffered, and accordingly there may be no need to trigger Article 390 of the Civil Code or section 3 of the Conventional Penalties Act.

Under South African law, liquidated damages provisions are triggered automatically upon the breach of the relevant term in the contract. Under the Civil Code, the

---

595 It may also be asserted that “prejudice” is broader than “harm”. As noted, under South African law, “prejudice” goes beyond mere pecuniary loss and a court will consider all legitimate and protectible interests of the employer. Under UAE law, it is arguable that in line with Islamic law, damage should only be in the amount suffered.

596 Under the Red Book, the computation methodologies are restricted to the timing of performance. Should parties wish to make liquidated damages applicable to performance criteria, parties would need to modify the conditions of contract accordingly.

Stellenbosch University https://scholar.sun.ac.za

amount will only fall due once the contractor has been notified unless there are provisions to the contrary contained in the contract or under law.[597] In this regard, should the parties to the construction contract resort to the Red Book, conflicting views exist and, it is a matter of debate whether an employer may simply deduct damages or whether an employer is obliged to follow a prescribed procedure in the Red Book before doing so. Arguably, this prescribed procedure is flawed in so far as requiring a third (namely the engineer) to "determine" the liquidated damages amount will defeat the purpose of a pre-agreed quantification by the parties, thereby detracting from the identified benefits of liquidated damages provisions.

Whilst clause 8.7 of the Red Book most certainly is practical and effective, parties may wish to modify its provisions to avoid any discrepancies. This is especially relevant in jurisdictions such as South Africa and the UAE where it may be permissible for liquidated damages to be punitive in nature. Parties must ensure that the contract, on a proper interpretation thereof, does not restrict the provision for a recovery of liquidated damages to a genuine pre-estimate of the loss. This is especially prevalent under the Red Book where conflicting views exist over the true interpretation of "delay damages".

In many jurisdictions, provisions for liquidated damages which are punitive in nature are unenforceable. Such an approach limits what parties may agree to and negates the principle of contractual freedom and can be seen as restrictive. In contrast, in jurisdictions such as South Africa and the UAE, liquidated damages provisions may include a punitive element. Parties instead, are provided with legislated protection provided for through judicial intervention. Whilst arguments exist that the judicial intervention infringes on the principle of *pacta sunt servanda* and may give rise to uncertainty, this approach is less paternalistic - parties are afforded the contractual freedom to include penal stipulations, albeit subject to judicial discretion, and such provisions are not automatically deemed unlawful. The Federal Supreme Court held:

> "It is established that delay fines in construction contracts are a financial penalty that project owners resort to when the contractor is in breach of its obligations in executing the work on time. *However, these penalties are subject to control*

[597] Article 387 of the Civil Code.

Stellenbosch University https://scholar.sun.ac.za

> *by law to protect a party* from any unjustified actions and from any contraventions of the law." [my emphasis][598]

Therefore, under both South African law and UAE law, courts recognise and uphold liquidated damages provisions. Liquidated damages provisions serve as an effective self-help remedy and a defaulting contractor is well advised to properly tender specific performance and, to do so timeously.

6 6 Conclusion

Liquidated damages provisions may serve as effective self-help remedies and are recognised under South African law, the law of the UAE and the Red Book. Additionally, the courts are willing to respect agreements entered into by the parties giving due regard to liquidated damages clauses. Such clauses serve as self-help remedies in a slightly subtler way than other self-help remedies such as liens, with their primary purpose being the alleviation of the burden on the employer to prove and quantify damages suffered as a consequence of delay. However, despite the contractor's ability to price for this risk, a contractor will still do its utmost to ensure that the risk does not materialise; prompting timeous and proper performance.

Furthermore, in jurisdictions such as South Africa and the UAE where such clauses may be punitive in nature, a contractor would be even further encouraged to perform. Whilst judicial intervention as a protection mechanism remains available to a contractor under both South African and UAE law, the utilisation of this mechanism is dependent upon the discharge of a burden of proof by the contractor. Even if the contractor is able to discharge this burden, there is no guarantee that a court will find in its favour and, as noted, under UAE law, a court is entitled to even make an upwards adjustment of the agreed compensation.

The ease in which liquidated damages clauses can be invoked by an innocent employer and the potential disastrous consequences which may occur should a liquidated damages clause be imposed to its full extent serve as key motivators in encouraging a defaulting contractor to perform specifically and timeously.

---

[598] Federal Supreme Court No. 595/18 dated 26 April 1998.

Stellenbosch University https://scholar.sun.ac.za

Therefore, it can be concluded that the threat of the imposition of liquidated damages serve as an effective self-help remedy for the innocent employer.

Stellenbosch University https://scholar.sun.ac.za

Chapter 7

Conclusion

Under both South African and UAE law, the courts recognise the primacy of specific performance and a party's corresponding right to an order of that effect; this remedy is theoretically also recognised in respect of construction contracts.[599] Should an aggrieved party to a construction contract be unable to compel a defaulting party to comply with what it has undertaken to do, it will be stranded with a partially completed project. This gives rise to a multiplicity of complications; primarily with regard to time and cost. It should therefore come as no surprise that an aggrieved party would want to compel specific performance as a primary remedy, as in most instances damages will be more than unsatisfactory.

However, should an aggrieved party approach a court for specific performance, there is no guarantee that the court will grant the aggrieved party what it has requested. Under both South African and UAE law, the courts may, in certain instances refuse to accede to a request for specific performance. This orientation, coupled with a general and traditional reluctance by the courts to make an order for specific performance in a construction setting, gives rise to uncertainty that an innocent contractant may not be awarded what has been asked.

Therefore, in many instances it is more certain, also in view of time and cost considerations, for an innocent party to resort to what has been styled "self-help" remedies to compel a defaulting party to comply with its obligations under the contract without judicial intervention. However, as a resort to self-help remedies is viewed with scepticism in many jurisdictions, it is imperative that these remedies are effectively regulated in order to achieve a balance between the interests of the aggrieved party and the defaulting party and, to ensure that such remedies do not undermine underlying considerations of principle and policy. [600]

---

599 See Chapter 3 "Specific Performance".

600 See Chapter 2 "The Construction Contract under UAE Law and South African Law in Context: an Overview".

Stellenbosch University https://scholar.sun.ac.za

After an overview of the law regarding specific performance in South African law and UAE law, this dissertation considered and focused on three self-help remedies resorted to in the construction industry and investigated their availability to a disgruntled and aggrieved party under South African law, UAE law, and the Red Book.

The first self-help remedy considered, as a remedy available to both an employer and a contractor, was that of a suspension of performance due under an agreement. Whilst both South Africa and the UAE recognise suspension founded in reciprocity and due performance, important guidance should also be drawn from the Red Book with the approach of the Red Book extending beyond the grounds for suspension under UAE law and South African law. The Red Book allows for elective suspension by an employer and whilst there is arguably merit for extending this right to elective suspension to the contractor as well,[601] the Red Book still maintains a good balance by setting out fairly extensive grounds (premised on non-payment) upon which a contractor may suspend performance of its obligations.

Furthermore, the Red Book addresses the important consequences of suspension, the according resultant cost of such suspension and, it balances the risk element inherent to suspension. The Red Book also allows for instances where the obligations of the parties are resumed or where the obligations of parties may be terminated due to prolonged suspension. Parties to a construction contract should therefore take due regard of the suspension provisions contained in the Red Book, and it is advisable for parties to incorporate similar provisions to the Red Book when concluding a construction contract.

Despite the complexities of suspension, it is a very effective self-help remedy to compel specific performance by a defaulting party despite the potential occurrence of economic waste.[602] This is evident through its regular and continued effective use in industry.[603]

601 See n347 and Chapter 5 “Liens and Liquidated Damages”.
602 See Gergen (2009) *B.U.L Rev.* 1410 for further discussion on economic waste.
603 See Beletskaya *Development of the Contractual Remedies* 122.

Stellenbosch University https://scholar.sun.ac.za

A lien, as a means to compel specific performance by a defaulting party, was the second self-help remedy considered by this dissertation. Liens are recognised under UAE law and South African law and whilst the requirements for the valid exercise of a lien under both jurisdictions are largely similar, liens are scarcely used under UAE Law. This is arguably largely due to the lack of binding precedent.

In contrast, the concept of liens is fairly advanced under South African law, and the requirements for the exercise of a lien are well developed. As this concept under South African Law is principally similar to UAE law, comparison between South African Law and UAE Law can easily be made (and accordingly used) to advance the development of liens as self-help remedies under UAE law.

It may be asserted that the Red Book makes provision for a possessory lien through implication only. Arguably this may have been purposefully done by drafters, like with liquidated damages, due to the difficulty in harmonising the divergent approaches adopted by various legal systems[604] regarding the existence and operation of a lien. Therefore, should parties not wish the provisions of the governing national legal system to apply, it is advised parties include special conditions to clarify the position under the Red Book.

When exercised correctly, a lien serves as an effective means to compel specific performance by a defaulting party and accordingly this self-help remedy should be afforded better regard under UAE law.

The final remedy considered by this dissertation was liquidated damages.[605] This remedy is attractive primarily to an employer by guaranteeing it an election to impose a set sum in the instance of breach by the contractor, and thereby relieving the employer from the burden of proving damages requirements in instances where a contractor fails to ensure that the executed works comply with pre-agreed performance criteria or where a contractor fails to perform its obligations timeously.

---

604 See n25 and Chapter 5 “Liens and Liquidated Damages”.
605 See Chapter 5 “Liens and Liquidated Damages”.

Stellenbosch University https://scholar.sun.ac.za

Therefore, even if a contractor is able to price this risk, it stands to reason that the contractor will still wish to avoid the materialisation of such a risk and will do its utmost to discharge its performance obligations – especially given the ease in which the employer can impose such liquidated damages. Furthermore, the effectiveness of liquidated damages provisions is amplified in instances where such provisions contain a punitive element.

Liquidated damages provisions can be regarded as self-help remedies as they firstly align with the definition of a "self-help remedy" namely legally permissible conduct used to compel performance without the assistance of a judicial entity[606] and secondly, as liquidated damages provisions are automatically triggered upon contract breach, and an employer is afforded an election to not impose liquidated damages; it may be said that the employer, by not exercising this election and electing to impose liquidated damages, is inadvertently choosing to use a self-help remedy.

Liquidated damages provisions are afforded recognition under UAE law and South African law. Both jurisdictions allow for legislative protection through judicial intervention in instances where a liquidated damages provision is out of proportion to the loss suffered.

Under South African law, this legislated recourse is only available to the defaulting party and liquidated damages provisions can only be adjusted downwards. This is in contrast to UAE law where an aggrieved party is afforded the right, upon application for such liquidated damages to be adjusted upwards. There is merit in this approach and such entitlement should be extended to an innocent party under South African law.

Apparently liquidated damages are titled "Delay Damages" under the Red Book to align divergent approaches between jurisdictions which allow for a punitive element and those which do not. The Red Book contains provisions regarding the quantification of liquidated damages and an according maximum cap on such

606 See Gergen (2009) *B.U.L Rev.* 1398.

Stellenbosch University https://scholar.sun.ac.za

liquidated damages. However, the requisite procedure for deducting liquidated damages and the timing of such deductions has been subject to industry debate and not fully covered by the standard provisions of the Red Book - accordingly this is an area in which the Red Book could be improved.[607]

Self-help remedies such as suspension, liquidated damages and liens are effective in compelling compliance with a contract by a defaulting party. This is especially prevalent in construction contracts where there is a general reluctance by the courts to make an order for specific performance despite an award for specific performance being fundamental in these respective jurisdictions.

However, when resorting to such remedies, it is essential that a jurisdiction is sufficiently sophisticated to reconcile underlying principles of policy and to ensure that the delicate balance between the cornerstones of contract law (namely good faith, consensuality, freedom, privity and sanctity of contract) and public policy and principle is maintained.

Therefore, a resort by an aggrieved party to these self-help remedies in jurisdictions where such remedies are effectually regulated, balancing the rights and interests between the parties, and underlying considerations of policy and principle, is justifiable. Accordingly, self-help remedies serve, in the context of construction contracts, to effectively encourage specific performance by a defaulting party.

607 See n584.

Stellenbosch University https://scholar.sun.ac.za

INDEX OF SOURCES

BIBLIOGRAPHY

INDEX OF BOOKS

Bailey J *Construction Law* (2011), Oxon: Informa

Barr B and Grutters L *FIDIC Users' Guide* 3 ed (2006), London: ICE Publishing

Claassen RD *Dictionary of Legal Words and Phrases* (1999), South Africa: Lexis Nexis

Christie RH & Bradfield GB *Christie's the Law of Contract in South Africa* 7 ed (2016), Cape Town: Lexis Nexis

Daniels H *Beck's Theory and Principles of Pleadings in Civil Actions* 6 ed (2002), Cape Town: Lexis Nexis

De Vos W *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* 3 ed (1987), Cape Town: Juta

De Wet JC *Opuscula Miscellanea* (JJ Gauntlett (ed)) (1979), Durban: Butterworths

De Wet JC & Van Wyk AH *Die Suid-Afrikaanse Kontraktreg en Handelsreg* 4 ed (1978), Durban: Butterworths

Du Plessis JE *The South African Law of Unjustified Enrichment* (2012), Cape Town: Juta and Co

Eltom O *The Emirates Law in Practice: Case Law Study, 100 Legal Issues; with a Special Focus on the Emirate of Dubai* (2009), Dubai: Future Bookshop

Finsen E *Building Contract: A Commentary on the JBCC Agreements* 2 ed (2006), Cape Town: Juta & Co Ltd

Stellenbosch University https://scholar.sun.ac.za

Grose M *Construction Law in the United Arab Emirates and the Gulf* (2016), West Sussex: John Wiley & Sons Ltd

Loots PC *Construction Law and Related Issues* (1995), Cape Town: Juta & Co Ltd

Lubbe GF and Murray CM *Farlam and Hathaway Contract Cases: Materials and Commentary* 3 ed (1998), Cape Town: Juta

Mackay J (ed) *Halsbury's Laws of England* 4 ed reissue vol 16(2) (2003), London: LexisNexis

Pickavance K *Construction Law and Management* (2007), Oxon: Informa Law

Ramsden P *Mckenzie's Law of Building and Engineering Contract and Arbitration* 7 ed (2014), Cape Town: Juta & Co Ltd

Ramsey V & Furst S *Keating on Construction Contracts* 9 ed (2012), London: Sweet and Maxwell

Sonnekus JC and Neels JL *Sakereg Vonnisbundel* 2 ed (1994), Durban: Butterworths

Treitel GH *Remedies for breach of contract: A Comparative Account* 1st ed (1988), Oxford: Clarendon Press

Uff J *Construction law* 10 ed (2009), London: Sweet and Maxwell

Van der Merwe CG *Sakereg* 2 ed (1989), Durban: Lexis Nexis Butterworths

Van Huyssteen LF, Reinecke MFB & Lubbe GF *Contract - General Principles* 5 ed (2016), Cape Town: Juta & Co Ltd

Stellenbosch University https://scholar.sun.ac.za

Wessels JW *The Law of Contract in South Africa* (AA Roberts (ed)) 2 ed (1951), Durban: Butterworths

Whelan J *UAE Civil Code and Ministry of Justice Commentary* (2010), London: Sweet and Maxwell

Woodley M *Osborn's Concise Law Dictionary* 12 ed (2013), London: Sweet and Maxwell

Zimmermann R *The Law of Obligations Roman Foundations of the Civilian Tradition* (1990), Oxford: Oxford University Press

CHAPTERS IN EDITED COLLECTIONS

Beale H "Specific Performance and Injunction" in H Beale (various eds) *Chitty on Contracts* 32 ed (2015) 27-001, London: Sweet and Maxwell

Chern C "Remedies" in E Baker, B Mellors, S Chalmers & A Lavers (eds) *FIDIC Contracts Law and Practice* (2013) 8.1, Informa: Oxon

Cockrell A "Breach of Contract" in R Zimmermann & D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 303, Cape Town: Juta

Curtis M "Payment" in A Bartlett (various eds) *Emden's Construction Law by Crown Office Chambers* (2011) 6, United Kingdom: Lexis Nexis Butterworths

Curtis M "Adjudication" in A Bartlett (various eds) *Emden's Construction Law* by Crown Office Chambers (2011) 24, United Kingdom: Lexis Nexis Butterworths

Du Plessis JE "Possibility and Certainty" in D Hutchison, & CJ Pretorius (eds) *The Law of Contract in South Africa* 3 ed (2017) 213, Cape Town: Oxford University Press

Stellenbosch University https://scholar.sun.ac.za

Du Plessis JE "South Africa" in JM Smits (ed) *Elgar Encyclopaedia of Comparative Law* (2012) 814, Cheltenham: Edward Elgar Publishing Limited

Du Bois F "Introduction: History, System and Sources" in CG Van der Merwe & JE Du Plessis (eds) *Introduction to the Law of South Africa* (2004) 1, The Hague: Kluwer Law International

Eiselen S "Remedies for Breach" in D Hutchison & CJ Pretorius (eds) *The Law of Contract in South Africa* 3 ed (2017) 321, Cape Town: Oxford University Press

Floyd T "Formalities" in D Hutchison, & CJ Pretorius (eds) *The Law of Contract in South Africa* 3 ed (2017) 163, Cape Town: Oxford University Press

Hutchison D "The Nature and Basis of Contract" in D Hutchison & CJ Pretorius (eds) *The Law of Contract in South Africa* 3 ed (2017) 3, Cape Town: Oxford University Press

Kuschke B "Contractual Capacity" in D Hutchison & CJ Pretorius (eds) *The Law of Contract in South Africa* 3 ed (2017) 153, Cape Town: Oxford University Press

Lubbe GF "Contractual Derogation and the Discretion to refuse an Order for Specific Performance" in G Glover (ed) *Essays in Honour of AJ Kerr* (2006) 77, South Africa: LexisNexis Butterworths

Nienaber PM "Construction Contracts" in WA Joubert & JA Faris (eds) *LAWSA* vol 9 (2014) 1, Durban: LexisNexis

Naude T "Termination of Obligations" in D Hutchison & CJ Pretorius (eds) *The Law of Contract in South Africa* 3 ed (2017) 387, Cape Town: Oxford University Press

Pienaar G & Stevens A "Rights in Security" in R Zimmermann, D Visser & K Reid (eds) *Mixed Legal Systems in Comparative Perspective: Property and Obligation*

Stellenbosch University https://scholar.sun.ac.za

in Scotland and South Africa (2004) 758, Oxford: Oxford University Press

Scott TJ "Liens" in WA Joubert & JA Faris (eds) *LAWSA* (2003) 49 vol 15(2), Durban: LexisNexis

Visser DP "Enrichment" in WA Joubert & JA Faris (eds) *LAWSA* vol 17(3) (2018) 206, Durban: LexisNexis

Zimmermann R & Visser D "Introduction: South African Law as a Mixed Legal System" in R Zimmermann and D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 1, Cape Town: Juta

INDEX OF JOURNALS, ESSAYS AND REPORTS

Anonymous "Self-Help Remedies and Due Process" (2012) 48 *St John's Law Review* 661

Beck A "The Coming of Age of Specific Performance" (1987) 20 *Comparative and International Law Journal of Southern Africa* 190

Brendal NR, Barrette AL and El-Riachi W "The Availability in the UAE of Liens to Secure Payment under Construction Contracts" (2010) 24 *Arab Law Quarterly* 309

Chanock HJ "The Doctrine of Substantial Performance*"* (1935) *SA Law Times* 162

De Wet JC "Die Sogenaamde Exceptio non Adimpleti Contractus in die Praktyk van Vandag" (1945) *THRHR* 239

Dondorp H "Decreeing Specific Performance: A (Roman) Dutch Legacy" (2010) 16 *Fundamina: A Journal of Legal History* 40

Gergen MP "Theory of Self-Help Remedies in Contract, A" (2009) 89 *B.U.L Rev.* 1397

Stellenbosch University https://scholar.sun.ac.za

Hugo CF "The United Nations Convention on the International Sale of Goods: Its Scope of Application from a South African Perspective" (1999) 11 *SA Merc LJ* 1

Latham M "Constructing the Team" *HMSO Report* (1994), 1

Lennard G "Specific Performance of Construction Contracts – Archaic Principles Preclude Necessary Reform" (1972) 47 *Notre Dame L. Rev*. 1025

Lubbe GF "Law of Purchase and Sale" 1998 *Annual Survey of South African Law* 208

Mattei U "The Comparative Law and Economics of Penalty Clauses in Contracts" (1998) *Hastings International and Comparative Law Review* 884

McLennan JS "Specific Performance and impossibility of performance of contracts" (2001) 118 *SALJ* 245

Naudé T "Specific Performance against an employee - *Santos Professional Football Club (Pty) Ltd v Igesund*" (2003) 120 *SALJ* 269

Nicholas B "The Vienna Convention on International Sales Law" (1989) 105 *LQR* 201

Oleck H "Specific Performance of Builders Contracts" (1952) 21 *Fordham Law Review* 156

Pound R "The Progress of Law and Equity" (1920) 33 *Harv. L. Rev*. 420

Schwartz A "The Case for Specific Performance" (1979) 1118 *Yale Law School Legal Scholarship Repository Scholarship Series Faculty Scholarship Series* 271

Van der Merwe CG & Pienaar JM "Law of Property (Including Real Security)" 1998 *Annual Survey of South African* Law 284

Stellenbosch University https://scholar.sun.ac.za

Wiese M "South African perspective on a lien as real security right in Scottish law" 2017 *TSAR* 89

Wiese M "The Legal Nature of a Lien in South African Law" (2014) 17 *PER/PELJ* 2526

INDEX OF THESES

Beletskaya M *Development of the Contractual Remedies in International Trade: Comparative Analysis and Example if Implementation in Standard Construction Contracts* LLM thesis Helsinki University (2014)

El Tawil A *Liquidated Damages and Penalty in Construction Industry Comparative Study* Islamic University Gaza (2008)

Marican M *The Effect of Article 390(2) of the UAE Civil Code on Liquidated Damages Claims in the UAE Construction Industry* MSc thesis BUiD (2014)

Robertson DC *When Clients do not Pay: A Critical Analysis of the Legal Remedies available to the South African Building and Civil Engineering Contractors and Consultants* MSc thesis University of Pretoria (2011)

Van der Merwe SA *A Comparative Evaluation of the Judicial Discretion to Refuse Specific Performance* LLD thesis Stellenbosch University (2014)

INDEX OF WEBSITES

Al Mulla H "Damages and Contract in the UAE" (12-03-2010) *The In House Lawyer* http://www.inhouselawyer.co.uk/index.php/legal-briefing/damages-and-contracts-in-the-uae/

Attia F "Liquidated Damages – The Bigger Picture" (05-03-2012) *Law Update* http://www.tamimi.com/en/magazine/law-update/section-6/march-5/liquidated-damages-the-bigger-picture.html

Stellenbosch University https://scholar.sun.ac.za

Anonymous "Arabic Translation" *Britannica English* http://arabic.britannicaenglish.com/en/

Anonymous "Builder's Lien Triumphs, Owner not to take Law into Own Hands" (28-07-2015) *STBB* https://www.stbb.co.za/wp-content/uploads/stbb_plu28-2015_s2.pdf (28-07-2015) STBB

Anonymous "Contractual and Legal" (2017) *Master Builders Association* https://www.masterbuilders.co.za/index.php/contractual-and-legal

Anonymous "Construction Law In UAE: A Distinct Body" (01-11-13) *Law Teacher* https://www.lawteacher.net/free-law-essays/contract-law/construction-law-in-uae-a-distinct-body-contract-law-essay.php?cref=1

Baiter D "Time to Terminate" (20-06-2009) *Construction Week Online* http://www.constructionweekonline.com/article-5589-time-to-terminate/

Bailey J, Turrini M & Mariey K "The Risk of Suspension under Construction Contracts" 04-01-2017) *White & Case* https://www.whitecase.com/publications/alert/risks-suspension-under-construction-contracts#

Bell M "Liquidated Damages and The Doctrine of Penalties: Rethinking the War on Terrorem" (26-05-2011) *Society of Construction Law* https://www.scl.org.uk/papers/liquidated-damages-and-doctrine-penalties-rethinking-war-terrorem

Bester S "Construction Law – The Legal Principles underlying the Builder's Lien" (12-06-2012) *Markram* https://www.markraminc.co.za/knowledge/construction-law-the-legal-principles-underlying-the-builder-s-lien

Binnington C "Contractors in Suspense about Failure to Make Payment" (19-07-17)

Stellenbosch University https://scholar.sun.ac.za

BCA
http://www.bca.co.za/article/article-44-contractors-in-suspense-about-failures-to-make-payment

Blomfield A "Amending FIDIC Provisions on Delay Liquidated Damages: a Case Note on J Murphy & Sons Ltd v Beckton Energy Ltd [2016] EWHC 607 (TCC)" (03-06-2016) *King & Spalding* https://www.kslaw.com/blog-posts/amending-fidic-provisions-delay-liquidated-damages-case-note-j-murphy-sons-ltd-v-beckton-energy-ltd-2016-ewhc-607-tcc

Boshoff D "Understanding the Basic Principles of Property Law in South Africa" (30-08-2013) *The South African Council for the Quantity Surveying Profession* https://cdn.ymaws.com/www.sacqsp.org.za/resource/collection/876D0B9A-72A3-4AA9-B6F8-1BD0B2760F04/PSM_8___-_Basic_Principles_of_Property_Law_-_(CPD).pdf

Brand D "Suspension of Works" (12 03 2009) *Arabian Business*
http://www.arabianbusiness.com/suspension-of-works-79255.html

Bremer N "Liquidated Damages under the Law of the United Arab Emirates and its interpretation by the UAE Courts" (21-11-2015) *Research Gate*
https://www.researchgate.net/publication/284279837_Liquidated_Damages_under_the_Law_of_the_United_Arab_Emirates_and_its_Interpretation_by_UAE_Courts

Gould N "An Introduction to FIDIC, International Procurement and Development Bank Procurement" (26-04-2016) *ICE*
https://www.ice.org.uk/ICEDevelopmentWebPortal/media/Documents/News/Membership/FIDIC-paper-26-27-April-2016.pdf

Heywood M & Holmes C "How Fixed are your Liquidated Damages" (01-2015) *InSite* https://www.pinsentmasons.com/PDF/Insite-Construction-Middle-East-Newsletter-Issue-1.pdf

Stellenbosch University https://scholar.sun.ac.za

Ibrahim A & Mullen J "Liquidated Damages under UAE and UK law: a comparison." (09-10-2013) *Fenwick & Elliott Annual Review* https://www.fenwickelliott.com/research-insight/annual-review/2013/liquidated-damages-uae-uk-law-comparison

Leggett C & Raymont M "Getting paid: remedies for non-payment in the UAE construction industry" (27-04-2015) *Practical Law* http://constructionblog.practicallaw.com/getting-paid-remedies-for-non-payment-in-the-uae-construction-industry/Practical Law

MacCuish A & Newdigate N "Back to Basics – The Construction and Engineering Contract" (14-05-17) *Mondaq* http://www.mondaq.com/x/591360/Building+Construction/Back+To+Basics+The+Construction+Engineering+Contract

MacCuish A & Newdigate N "Liens and Priority Rights – 'self-help' remedies for the disgruntled contractor under UAE Law?" (12-05-2016) *Mondaq* http://www.mondaq.com/x/490630/Building+Construction/Liens+and+Priority+Rights+selfhelp+remedies+for+the+disgruntled+contractor+under+UAE+Law Mondaq

MacCuish A & Newdigate N "United Arab Emirates: Suspension Under the UAE Civil Code, FIDIC, and the Roman Law Maxim of Exceptio Non Adimpleti Contractus (ENAC*)" (15-12-2015) *Mondaq* http://www.mondaq.com/x/451986/Contract+Law/This+is+the+first+of+two+articles+which+look+at+various+selfhelp+remedies+available+for+the+unpaid+contractor Mondaq

Maritz MJ & Tshikila S "The Extent of Enforcement of The Penalty Clause on Public Sector Construction Contracts in South Africa" *University of Pretoria* http://www.irbnet.de/daten/iconda/CIB_DC24516.pdf

McCormack A "Is there a better alternative to liquidated damages on construction projects?" (06-05-2014) *Corrs Chambers Westgarth*

Stellenbosch University https://scholar.sun.ac.za

https://www.corrs.com.au/thinking/insights/is-there-a-better-alternative-to-liquidated-damages-on-construction-projects/

Raffie Y, Whittle J & Pabian E "Does a builder enjoy a lien over state owned property?" (16-11-2017) *CDH* https://www.cliffedekkerhofmeyr.com/en/news/publications/2016/dispute/dispute-resolution-alert-16-november-does-a-builder-enjoy-a-lien-over-state-owned-property.html CDH

Rankin E "How the law of liquidated damages can be applied in the local jurisdiction" (09-06-2007) *Arabian Business* http://www.arabianbusiness.com/how-law-of-liquidated-damages-can-be-applied-in-local-jurisdiction-143768.html

Saunders R "FIDIC: Suspension and termination under Red, Yellow and Silver Books" *Practical Law* http://uk.practicallaw.com/5-502-7110?q=suspension Practical Law

Shnookal T & Charrett D "Standard Form Contracting; The Role for FIDIC Contracts Domestically and Internationally" (19-06-2010) *Society of Construction Law* http://208.76.83.195/~mtecccom/wp-content/uploads/2010/06/Shnookal_Toby.pdf

Teo E "Highlights of the Laws of the United Arab Emirates, the People's Republic of China" (09-2011) *Al Tamimi Law Update* http://www.tamimi.com/en/magazine/law-update/section-7/august-september1/highlights-of-the-laws-of-the-united-arab-emirates-the-peoples-republic-of-china-and-the-common-law.html

Wade C "The FIDIC Contracts and Current Trends" (06-07-2006) *Society of Construction Law Hong Kong* https://www.scl.hk/file/paper/SCLHK044.pdf

INDEX OF LEGISLATION

South Africa

Alienation of Land Act, 68 of 1981

Stellenbosch University https://scholar.sun.ac.za

Basic Conditions of Employment Act, 75 of 1997

Constitution of the Republic of South Africa, 1996

Construction Industry Development Board Act, 38 of 2000

Conventional Penalties Act, 15 of 1962

Housing Consumers Protection Measures Act, 95 of 1998

Insolvency Act, 24 of 1936

Labour Relations Act, 66 of 1995

Preferential Procurement Policy Framework Act, 5 of 2000

Promotion of Administrative Justice Act, 3 of 2000

Public Finance Management Act, 1 of 1999

Regulations

GN R 482 in *GG* 38822 of 29-05-2015

United Arab Emirates

Abu Dhabi Law No.6 of 2008

Dubai Law No. 6 of 1997

UAE Federal Law No. 5 of 1985

UAE Federal Law No.18 of 1993

Jurisdictions other than South Africa or the United Arab Emirates

Bahrain Civil Code

Building and Construction Industry (Security of Payments) Act, 2009

Construction Contracts Act, 2002

Construction Industry Payment and Adjudication Act, 2012

German Civil Code

Housing Grants Construction and Regeneration Act, 1996

Jordan Civil Code

Kuwait Civil Code

Laws of Malaysia Act, 746

Local Democratic Economic Development and Construction Act, 2009

Oman Civil Code

Qatar Civil Code

Stellenbosch University https://scholar.sun.ac.za

INDEX OF CASE LAW

South Africa

Adams v SA Motor Industry Employers Association 1981 (3) SA 1189 (A)

Administrator, Natal v Magill, Grant & Nell (Pty) Ltd (In Liquidation) 1969 (1) SA 660 (A)

Afriscan Construction (Pty) Ltd v Umkhanyakude District Municipality & Another [2005] JOL 14365 (D)

Afrox Healthcare Bpk v Strydom 2002 (6) SA 21 (SCA)

Andries van der Schyff en Seuns (Pty) Ltd t/a Complete Construction v Webtrade Inv No 45 (Pty) Ltd and Others 2006 (5) SA 327 (W)

Associated South African Bakeries (Pty) ltd v Oryx & Vereinigte Backereien (Pty) Ltd 1982 3 SA 893 (A)

B K Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk 1979 (1) SA 391 (A)

Barker v Beckett & Co Ltd 1911 TPD 151

Barkhuizen v Napier 2007 (5) SA 323 (CC)

Bredenkamp and Others v Standard Bank of South Africa Ltd 2010 (4) SA 468 (SCA)

Beetge v Drenka Investments (Isando) (Pty) Ltd 1964 4 SA 62 (W)

Benson v SA Mutual Life Assurance Society 1986 (1) SA 776 (A)

Botha v Rich NO 2014 (4) SA 124 (CC)

Breslin v Hichens 1914 AD 312

Brisley v Drotsky 2002 (4) SA 1 (SCA)

Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons 1970 (3) SA 264 (A)

Browns Asignees v Pote 4 EDC 50

Builders and Contractors v Langeler 1952 (3) SA 837 (N)

Builder's Depot CC v Testa 2011 (4) SA 486 (GSJ)

Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd and Another 1996 (4) SA 19 (A)

Citibank NA, South Africa Branch v Paul NO and Another 2003 (4) SA 180 (T)

Cohen v Shires McHattie and King 1882 1 SAR 41

Collins Submarine Pipelines Africa (Pty) Ltd v Durban City Council 1968 (4) SA 763 (A)

Stellenbosch University https://scholar.sun.ac.za

Conress (Pty) Ltd and Another v Gallic Construction (Pty) Ltd 1981 (3) SA 73 (W) 76

D Glaser & Sons (Pty) Ltd v The Master 1979 4 SA 780 (C)

Donaldson v Est Veleris 1938 TPD 269

Durban Corporation v McNeil 1940 AD 66

Edrei Investments 9 Ltd v Dis-chem Pharmacies (Pty) Ltd 2012 (2) SA 553 (ECP)

Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012 (1) SA 256 (CC)

Farmers' Co-operative Society (Reg) v Berry 1912 AD 334

FHP Management (Pty) Ltd v Theron NO and another 2004 (3) SA 392 (C)

Gouws v Jester Pools (Pty) Ltd 1968 (3) SA 563 (T)

Grafton House, Ltd. v White and Co 1923 WLD 117

Hauman v Nortje 1914 AD 293

Hamilton Paneelkloppers v Nkomo 1991 (2) SA 534 (O)

Hansen and Schrader v Deare (1883-1884) 3 EDC 36

Haynes v Kingwilliamstown Municipality 1951 (2) SA 371 (A)

Hasewinkel v Simoes 1966 (2) SA 81 (W)

Howes & Clover (Pty) Ltd v Ruskin & Others 1978 (1) SA 99 (W)

Hunter & Turpin v Standard Bank, Pietermaritzburg (1883) 4 NLR 49

In re SA Loan, Mortgage and Mercantile Agency v Owens and Campbell 4 NLR 68

Insolvent Estate of Israelson v Harris and Black (1905) 22 SC 135

ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd 1981 (4) SA 1 (A)

Insolvent Estate of Israelson v Harris and Black 22 SC 135 (1905)

Jointshelf 117 CC and Others v Close – By Security CC v Close by Security [2007] ZANWHC 55

Joubert Galpin Searle v Road Accident Fund 2014 (4) SA 148 (ECP)

Kam v Udwin 1940 WLD

Kelly and Hingle's Trustees v Union Government (Minister of Public Works) 1928 TPD 272

Stellenbosch University https://scholar.sun.ac.za

Kommissaris van Binnelandse Inkomste v Anglo - American (OFS) Housing Co Ltd 1960 (3) SA 642 (A)
Land Bank v Mans 1933 CPD 625
Levy v Tyler 1933 CPD 377
Liquidators of Royal Hotel Co v Rutherford 16 CTR 179
Makhubedu and Another v Ebrahim 1947 (3) SA 155 (T)
Masetlha v President of the Republic of South Africa 2008 (1) SA 566 (CC)
Martin Harris & Seuns OVS (Edms) Bpk v Qwa Qwa Regeringsdiens; Qwa Qwa Regeringsdiens v Martin Harris & Seuns OVS (Edms) Bpk 2000 (3) SA 339 (SCA)
McCarthy Retail Ltd v Shortdistance Carriers 2001(3) SA 482 (SCA)
Meyer v Glendinning 1939 CPD 84
Morris v Taljaard 1952 (1) SA 49 (C)
Mouton v Smith 1977 (3) SA 1 (A)
Moss v Begg 1908 TH 1
National Union of Textile Workers v Stag Packings (Pty) Ltd 1982 (4) SA 151 (T)
Nationwide Airlines (Pty) Ltd v Roediger 2008 (1) SA 293 (W).
NBS Bank Bpk v Dirma BK en 'n Ander 1998 (1) SA 556 (T)
Nienaber v Stuckey 1946 AD 1049
Nino Bonino v De Lange 1906 TS 120
Nisenbaum and Nisenbaum v Express Buildings Ltd 1953 (1) SA 246 (W)
Oldham v Kerns 27 NLR 17
Pearl Assurance Co Ltd v Union Government 1933 AD 277
Pearl Assurance Co Ltd v Union Government 1934 AD 560
Phillips and Gordon v Adams 1923 EDL 104
Pheiffer v Van Wyk [2015] JOL 33632 (SCA)
Ploughall (Edms) Bpk v Rae 1971 (1) SA 887 (T)
Plumbago Financial Services (Pty) Ltd t/ Toshiba Rentals v Janap Joseph t/a Project Finance 2008 (3) SA 47 (C)
Potgieter v Davel 1966 3 SA 559 (O)
Potgieter and Another v Potgieter NO and Others 2012 (1) SA 637 (SCA)
Pretoria Racing Club v Van Pietersen 1907 TS 687
Provincial Administration (OFS) v John Adams & Co 1929 OPD 29
Putco Ltd v TV and Radio Guarantee Co (Pty) Ltd 1985 (4) SA 809 (A)

Stellenbosch University https://scholar.sun.ac.za

Re Carter; Carter and Carter (1885) LJ Ch230

Ranch International Pipelines (Transvaal) (Pty) Ltd v LMG Construction (City) (Pty) Ltd 1984 (3) SA 861 (W)

Roberts Construction Co Ltd v Verhoef 1952 (2) SA 300 (W).

Sandton Square Finance (Pty) Ltd v Vigliotti 1997 (1) SA 826 (W)

Santos Professional Football Club (Pty) Ltd v Igesund 2003 (5) SA 73 (C)

Scholtz v Faifer 1910 TS 243

Seloadi v Sun International (Bophuthatswana) Ltd 1993 (2) SA 174 (BG)

Shakinovsky v Lawson and Smulowitz 1904 TS 362

Shill v Milner 1937 AD 101

Sifris en 'n Ander NNO v Vermeulen Broers 1974 (2) SA 218 (T)

Simmons NO v Bantoesake Administrasieraad 1979 (1) SA 940 (T)

Singh v McCarthy Ltd t/a McIntosh Motors 2000(4) SA 795 (SCA)

Smit v Workmen's Compensation Commissioner 1979 (1) SA 51 (A)

Smit v Bester 1977 (4) SA 937 (A)

Smith v Mouton 1977 (3) SA 9 (W)

South African Forestry Co Ltd v York Timbers Ltd 2005 (3) SA 323 (SCA)

Spitz v Kesting 1923 WLD 45

Steinberg v Lazard 2006 (5) SA 42 (SCA)

Sterner v Morom 20 SC 499

Strachan v Prinsloo 1925 TPD 7090

Swartz and Son (Pty) Ltd v Wolmaransstad Town Council 1960 (2) SA 1 T

The Colonial Government v Smith, Lawrence & Mould and Others (1885-1886) 4 SC 194

Thomas Construction (Pty) Ltd (in liquidation) v Grafton Furniture Manufacturers (Pty) Ltd 1986 (4) SA 510 (N)

Thompson v Scholtz 1999 (1) SA 232 (SCA)

Thompson v Pullinger 1894 1 OR 298

Tobacco Manufacturers Committee v Green & Sons 1953 (3) SA 480 (A)

Troskie v Van der Walt 1994 (3) SA 545 (O)

Trustees of Smookler v Golombick 1905 TH 221 222

United Building Society v Smookler's Trustees and Golombick's Trustee 1906 TS 623

Valasek v Consolidated Frame Cotton Corporation Ltd 1983 (1) SA 694 (N)

Stellenbosch University https://scholar.sun.ac.za

Van Aardt v Galway 2012 (2) SA 312 (SCA)
Van der Westhuizen v Velenski (1898) 15 SC 237
Van Staden v Central South African Land and Mines 1969 (4) SA 349 (W)
Van Rensburg v Straughan 1914 AD 317
Vuka-Uzenzele Plant Hire & Civils CC v Ho Hup Corporations (SA) (Pty) Ltd [2010] ZAECPEHC 54
Wightman t/a JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA)
Woods v Walters 1921 AD 303
Wynland Construction (Pty) Ltd v Ashley-Smith and Others 1985 (1) SA 534 (C)
Young v Land Values Ltd 1924 WLD 216

United Arab Emirates

Abu Dhabi Court of Cassation 34/Judicial Year 1 dated 5 December 2007
Abu Dhabi Court of Cassation 492/Judicial Year 3 dated 25 June 2009
Abu Dhabi Court of Cassation 647/Judicial Year 3 dated 28 February 2008
Abu Dhabi Court of Cassation 647/2008 dated 26 February 2009
Abu Dhabi Court of Cassation 725/2010 dated 4 November 2010
Abu Dhabi Court of Cassation 941/Judicial Year 3 dated 29 September 2009
Abu Dhabi Court of Cassation 987/Judicial Year 3
Abu Dhabi Court of Cassation 1394/2009 dated 28 February 2010
Abu Dhabi Court of Cassation 1452/2009
Dubai Court of Cassation 76/2009
Dubai Court of Cassation 102/2007
Dubai Court of Cassation 124/2005
Dubai Court of Cassation 149/2007
Dubai Court of Cassation 170/1998
Dubai Court of Cassation 160/2005
Dubai Court of Cassation138/1994
Dubai Court of Cassation 102/2007
Dubai Court of Cassation 170/1998
Dubai Court of Cassation 102/2007
Dubai Court of Cassation 170/1998
Dubai Court of Cassation 102/2007

Stellenbosch University https://scholar.sun.ac.za

Dubai Court of Cassation 138/1994
Dubai Court of Cassation 170/1998
Dubai Court of Cassation 255/2007
Dubai Court of Cassation 149/2006
Dubai Court of Cassation 349/2002
Dubai Court of Cassation 349/2009
Dubai Court of Cassation 25/2007
Dubai Court of Cassation 6/2009
Dubai Court of Cassation 111/2007
Federal Supreme Court No. 595/1998
Union Supreme Court 26/Judicial Year 24 dated 1 June 2004
Union Supreme Court 103/Judicial Year 24 dated 21 March 2004
Union Supreme Court 218/Judicial Year 25 dated 27 November 2004
Union Supreme Court 349/Judicial Year 24 dated 5 November 2003
Union Supreme Court 370/Judicial Year 20 dated 2 May 2000
Union Supreme Court 414/Judicial Year 21 dated 27 March 2001
Union Supreme Court 610/Judicial Year 20 and no. 7 of Judicial Year 21 dated 6 June 2000

Jurisdictions other than South Africa or the United Arab Emirates

Airport Industrial GP Ltd and Airport Industrial Nominees Ltd v Heathrow Airport Ltd and AP16 Ltd [2015] EWHC 3753 (Ch)
*Bakersfield Country Club v. Pacific Water Co.*192 Cal. App. 2d 528, 13 Cal. Rptr.573 (1961)
Carpenters Estate Ltd v Davies [1940] 1 All ER 13
Cavendish Square Holding BV v El Makdessi [2015] UKSC 67 and *Parking Eye Ltd v Beavis* [2015] UKSC 67
Channel Tunnel v Balfour Beatty (1992) QB 656
City of London v Nash Eng. Rep 859 (1747)
Ipson Renovations Ltd v The Incorporated Owners of Connie Towers [2016] HKCFI 2117 (16 December 2016)
J Murphy & Sons Ltd v Beckton Energy Ltd [2016] EWHC 607 1
Lubenham Fidelities & Investment Co Ltd v South Pembrokeshire District Council & Anor (1986) 33 BLR 39

Stellenbosch University https://scholar.sun.ac.za

Lumley v Wagner (1852) 1 De GM & G 604

Mayfield Holdings Ltd v Moana Reef Ltd [1973] 1 NZLR 309

Re Carter; Carter and Carter (1885) LJ Ch230

Sokoloff v Harriman Estates Development Corp 2001 NY Int. 97

Suisse Atlantique v RNV Rotterdamsche Kolen Centrale [1967] AC 361

Wesiak v D&R Constructions (Aust) Pty Ltd [2016] NSWCA 353 (15 December 2016)

Wolverhampton Corporation V Emmons [1901] 1 KB 515